Applicant Details

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Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**June 2021**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 4, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**American Journal of Criminal Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

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May 26, 2023

The Honorable Judge Morales
United States District Court
Southern District of Texas
1133 N. Shoreline Blvd.
Corpus Christi, Texas 78401

Dear Judge Morales:

I am a rising third year law student at the University of Texas School of Law and am pleased with the opportunity to submit this application for a clerkship in your chambers for the 2024-2025 term. As an only child of immigrant parents born and raised in Harlingen, Texas, I bear a deep appreciation for how the law and its agents affect the lives of ordinary people in the Rio Grande Valley. It is my hope to lend my unique combination of skills, integrity, and commitment to further this court's mission to administer the law consistently and equitably.

Though my military background might suggest that my service-oriented attitude was learned, I must emphasize its earlier presence. The care of others for which I bore responsibility was a dominant theme during my pre-college life. My parents' former undocumented status long motivated my success to secure their welfare. During high school, I became a Certified Nursing Assistant, and developed amicable relationships with nursing home residents during my training. Though college presented a welcome opportunity for self-exploration, my desire to serve continued to motivate my pursuits. While maintaining a distinguished academic reputation, I began a relationship working with the United States Marine Corps that continues to this day. While my post-graduation plans as a Judge Advocate are confirmed, I hope that my first act of professional service will be directed at the community that raised me as a clerk in your chambers.

Included is a resume, transcripts, a writing sample, and letters of recommendation from professors Lawrence G. Sager and Patrick Woolley and former employer, Mrs. Victoria C. North. Professor Lucas A. Powe has agreed to serve as a supplementary contact. These contacts may be reached as follows:

Professor Lawrence G. Sager, The University of Texas School of Law
(lsager@law.utexas.edu; lawrencesager@gmail.com; 512-232-1355; 512-698-6842)

Professor Patrick Woolley, The University of Texas School of Law
(pwoolley@law.utexas.edu; 512-232-1323)

Professor Lucas A. Powe, The University of Texas School of Law
(spowe@law.utexas.edu; 512-232-1345)

Mrs. Victoria C. North, Texas Comptroller of Public Accounts, Austin, Texas
(Victoria.North@cpa.texas.gov; 512-463-6243)

Additionally, the Law School's clerkship advisor, Kathleen Overly, is available to answer your questions. You may reach her at koverly@law.utexas.edu or 512-232-1316. Please let me know if I may be of further assistance.

Respectfully,

Carlos A. Torres

Enclosures

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EDUCATION

The University of Texas School of Law, Austin, TX
J.D. Expected May 2024
GPA: 3.52

- AMERICAN JOURNAL OF CRIMINAL LAW, 2022–2023, *Staff Editor*
- *Teaching Assistant* for Professor Lucas Powe, Spring 2023
- The Paper Chase Legal Writing Competition Top 10 Finalist, 2022 (Memorandum judged against submissions from all Texas law schools)
- Volunteer Student-Note Taker, 2022–2023
- University of Texas Election Supervisory Board, 2021–2022, *Secretary*
- American Constitution Society, 2021–2022, *1L Representative & Member*

The University of Texas at Austin, Austin, TX
B.A. *magna cum laude* in Philosophy & Government *with High Honors*, May 2021
GPA: 3.95

- Student Conduct Board, 2018–2021, *Member & Hearing Foreperson*
- Sanger Learning Center, 2019, *Peer Coordinator* (Study group organizer and materials drafter)
- The Project, February 2018 & 2019, *Volunteer* (University-wide largest single day of community service)

WORK EXPERIENCE

Teacher Retirement System of Texas, Austin, TX
Legal and Compliance Intern, June – August 2023
Texas Comptroller of Public Accounts, Fiscal and Agency Affairs Legal Services, Austin, TX
Legal Intern, June – August 2022

- Wrote and submitted internal memoranda covering a variety of issues on request from legal counsel.
- Attended and observed meetings concerning litigation strategy and legislative proposals.

United States Marine Corps, Austin, TX
2nd Lieutenant, Reserves*,* June 2021 – Present

- Voluntarily assist staff with administration of the Austin, Texas Officer Selection Office.
- Voluntarily lead and assist Officer Applicants with physical training and leadership skill development.

United States Marine Corps Officer Candidates School, Quantico, VA
Officer Candidate, June – August 2020

- Led subordinate units in tactical training exercises under evaluation.
- Delegated tasks to subordinate leaders when assigned leadership roles under evaluation.
- Executed all necessary administrative movements and inspected for completion and accountability.

United States Marine Corps Officer Selection Office, Austin, TX
Officer Applicant and Marine, September 2018 – Present

- Voluntarily participated in physical and leadership skill training to earn spot in Officer Candidates School.
- Voluntarily lead and assist Officer Applicants with physical training and leadership skill development following graduation from Officer Candidates School but prior to commissioning.

INTERESTS & SKILLS

- Leading group-oriented cardiovascular and calisthenic exercise
- Collecting artistically recognized vintage films
- Progressive and alternative rock lyrical appreciation
- Can speak Spanish (advanced) and Italian (intermediate)

Updated on June 1, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

PROGRAM: Juris Doctor

OFFICIAL NAME: TORRES, CARLOS ARNOLDO
PREFERRED NAME: Torres, Carlos A.

DEGREE: in progress seeking JD TOT HRS: 57.0 CUM GPA: 3.52

FAL 2021	534	CONSTITUTIONAL LAW I	5.0	A-	LGS
	332R	LEGAL ANALYSIS AND COMM	3.0	B+	EMY
	433	CIVIL PROCEDURE	4.0	B-	TR
	431	PROPERTY	4.0	B-	SMJ
SPR 2022	421	CONTRACTS	4.0	B+	AKU
	423	CRIMINAL LAW I	4.0	A-	JEL
	427	TORTS	4.0	A-	TOM
	232S	PERSUASIVE WRTG AND ADV	2.0	B	WCS
FAL 2022	481C	CONST LAW II: AMENDMENT	4.0	A	LAP
	382V	RESTITUTION	3.0	B+	AKU
	483	EVIDENCE	4.0	A-	GBS
	486	FEDERAL COURTS	4.0	A-	PW
SPR 2023	383G	CAPITAL PUNISHMENT: ADV	3.0	A	JM
	385	PROFESSIONAL RESPONSIBI	3.0	A-	FSM
	396W	STATUTORY INTERPRETATIO	3.0	A-	BAP
	397S	SMNR: SUPREME COURT	3.0	A	LGS

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2021	16.0	16.0	16.0	3.13
SPR 2022	30.0	30.0	30.0	3.49
FAL 2022	45.0	45.0	45.0	3.70
SPR 2023	57.0	57.0	57.0	3.85

06-01-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

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WRITING SAMPLE

This sample was written as part of a Supreme Court seminar whereby I, along with eight students, played the role of Supreme Court Justices in disposing of cases on the actual Supreme Court's docket. This sample is part of the majority opinion for *Moore v. Harper*, the independent state legislature (ISL) case out of North Carolina.

The central issue was whether Article I, Section 4 of the United States Constitution, also known as the Elections Clause, which reads, in part, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof" precluded state courts from subjecting relevant state legislature prescriptions to state constitutional limits. The full opinion held that it did not.

The relevant part reproduced here analyzes the meaning of "prescribed" as used in the Elections Clause and argues that it is best understood as delegating primary authority to state legislatures to outline the rules for administering federal elections, subject to the normal constraints of their and the federal constitutions. In reaching this conclusion, I first dispose with petitioner's primary textual arguments and then make an affirmative argument of my own.

Because this piece was extracted from a larger opinion, citation format reflects the relationship of the cited sources in the context of the whole work from which this sample was extracted. The citation format thus does not assume that the sample reproduced below is the complete work. I was fully responsible for writing this opinion.

III.

Due to this facial ambiguity in the meaning of "prescribe" under the Elections Clause, we turn to context to adduce the true meaning of the term.[1]

A.

We thus make note of the fact that "prescribe" and its variations appear four other times throughout the US Constitution, not including its use in the Elections Clause.[2] This is important because the canon of consistent usage counsels that we should read a term to bear consistent meaning where it appears throughout a text, absent material variation in its use.[3]

First, Article I, sec. 7, concerning presentment of legislation to the President for approval, directs that proposed legislation will become law notwithstanding presidential veto if reconsidered and repassed by the requisite proportion of both houses of Congress "according to the Rules and Limitations *prescribed* in the Case of a Bill."[4] Second, Article I, sec. 8, empowering Congress to provide for maintenance of the militia, reserves to the states the power to train the militia "according to the discipline *prescribed* by Congress."[5] Third, Article IV, sec. 1, the Full Faith and Credit Clause, empowers Congress, by general laws, to "*prescribe* the Manner" in which the "Acts, Records, and Proceedings" of the states "shall be proved, and the Effect thereof."[6] Finally, the Third Amendment prohibits the unconsented to quartering of soldiers in time of peace or war, "but in a manner to be *prescribed* by law."[7]

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[1] *See Yates v. United States*, 574 U.S. 528, 539 (2015) (resorting to extensive tour through canons of construction to disambiguate term contained in Sarbanes-Oxley Act).
[2] *See* U.S. Const. art. I, § 7, cl. 3; U.S. Const. art. I, § 8, cl. 1; U.S. Const. art. IV, § 1; U.S. Const. amend. III.
[3] *See Brown v. Gardner*, 513 U.S. 115, 118 (1994).
[4] U.S. Const. art. I, § 7, cl. 3.
[5] U.S. Const. art. I, § 8, cl. 1.
[6] U.S. Const. art. IV, § 1.
[7] U.S. Const. amend. III

At a first gloss, the argument has some force that giving the Elections Clause's use of "prescribe" consistent meaning with these foregoing uses involves imputing onto the power to prescribe a power to direct exclusive of external modification. Afterall, the uses of "prescribe" and its variations highlighted above involve delegations of power to Congress. On some level, it would be foolhardy to suggest that when the power to prescribe is given to Congress, it means nothing more than that Congress is to be the first mover on such matters and carries no implication of exclusivity as, for example, against the states. Nonetheless, we think there is sufficiently material variation in the Constitution's four other uses of "prescribe" to justify a departure from the ordinary consequences of the consistent usage canon.[8]

The fact that these four other uses involve *Congress*'s power to prescribe is a significant reason to view the prescription power under the Elections Clause as bearing unique meaning. This is because when Congress makes lawful prescriptions in pursuance of authority granted by the Constitution, those prescriptions become "the supreme Law of the Land."[9] Under our Supremacy Clause jurisprudence, valid laws passed pursuant to legitimate constitutional authority preempt and displace conflicting exercise of power by the states.[10] Thus, it is the Supremacy Clause itself which supplies the necessary implication that the power to prescribe, when exercised by Congress, does include a corollary feature of preemption against at least some conflicting exercises of authority.

The Elections Clause, to the contrary, stands utterly alone as the only instance in the Constitution in which the power to prescribe is granted not to Congress, but the state legislatures. Absent a constitutional protection like the Supremacy Clause to vest lawful state prescriptions

[8] *See United States v. Garcon*, 54 F.4th 1274, 1279 (11th Cir. 2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)).
[9] U.S. Const. art. VI, cl. 2
[10] *See M'Culloch v. State*, 17 U.S. 316, 326–30 (1819).

with some immunity from conflicting exercises of power, it is not at all implausible to conclude that the power to prescribe under the Elections Clause is indeed nothing more than the power to be the first mover.

But supposing that there is no material variation in any of these instances of the Constitution's use of the term "prescribe" that would permit us to ignore the canon of consistent usage, it still doesn't appear obvious that Petitioners can elude the applicability of state constitutional principles on the state legislatures' exercise of the prescription power. If we instead read every instance of "prescribe" consistently, it becomes clear that the power of a legislative body to prescribe is not exclusive of the authority of that body's founding charter to condition and limit the prescription. This is because when Congress prescribes, it is always subject to the limitations of the Federal Constitution. Read consistently, the conclusion that the state legislatures are limited by their own constitutions when they prescribe pursuant to the Elections Clause flows just as naturally.

It is apparent then, that the canon of consistent usage will not settle our inquiry as to whether the state legislature's power to prescribe under the Elections Clause is exclusive of the power of state judiciaries to subject those prescriptions to state constitutional review and, if it does, it may actually do so contrary to Petitioner's position.

B.

Petitioner's next rely on the *expressio unius* canon to supply the necessary implication of independence of state legislature prescriptions under the Elections Clause from their constitutions.[11] The argument goes like this: the Elections Clause delegates power specifically to the state legislatures to prescribe the time, place, and manner of conducting federal congressional elections; the Elections Clause does not mention state judiciaries or their ability to subject those

[11] Pet'r['s] Br. 18.

prescriptions to state constitutional scrutiny; it would be strange for the Elections Clause to nonetheless permit state constitutional review of those prescriptions by the state judiciary despite the absence of any such explicit permission to that effect; therefore, the Elections Clause should not be so construed.[12]

We recognize that the *expressio unius* principle, that expression of one item in an associated group excludes items left unmentioned, is a powerful tool of statutory and constitutional interpretation.[13] Nonetheless, this court's more recent attitudes toward *expressio unius* have significantly diluted the extent of the canon's influence. The applicability of *expressio unius* is thus heavily context sensitive. Consequently, we have said that circumstances must support "a sensible inference that the term left out must have been meant to be excluded" and that the items to which the *expressio unius* argument applies must be part of an associated group or series "justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[14] In other words, "*expressio unius* does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."[15]

Present circumstances do not persuade us that *expressio unius* operates as an inexorable command to adopt Petitioner's interpretation of the Elections Clause. For while the Elections Clause says nothing about state constitutional scrutiny by state judiciaries, it similarly neglects to say a thing about federal constitutional scrutiny by either state or federal courts. Yet, Petitioners do not, nor could they, seriously contend that silence on this latter point is a reason to think state legislature prescriptions under the Elections Clause are immune from federal constitutional limits.

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[12] *Id.* at 17, 18.
[13] *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017).
[14] *Id.*; *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).
[15] *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013).

Instead, Petitioners explain that "judicial review is a background assumption of the American constitutional system," ostensibly to justify how it is that federal constitutional review remains undisturbed despite the Elections Clause's apparent neglect to make any mention of it in what Petitioner's otherwise argue is a sweeping grant of authority to state legislatures concerning the administration of federal congressional elections.[16] Yet it is apparent that equally important background assumptions underlay our constitutional system, and ones with which we are often familiarized in grade school: federalism, separation of powers, and checks and balances. The historical record is replete with founding-era concerns about the abuse of legislative power, both at the state and federal level, and apparent confidence in the ability of judicial review to reign in potential mischief by bringing constitutional limits to bear on the exercise of such power.[17] Indeed, contemporaneous with the founding, it was extremely commonplace for the various states to codify limitations on their legislatures' administration of federal congressional elections in their constitutions.[18] Furthermore, the founding generation unquestionably appreciated the bedrock principle of all constitutional government: that government power, whose very existence is owed to the founding charter under which the government is organized, is necessarily defined and limited by that charter.[19]

To the extent that these background principles were obviously on the minds of the framing generation, it is a reasonable assumption that the framers understood that when the states

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[16] Pet'r['s] Br. 11.
[17] *See* Madison, *The Federalist No. 48* 308–309 (1788); Hamilton, *The Federalist No. 78* 470 (1788); *See generally The Federalist No.51* (1788); Madison, *The Federalist No. 47* 301 (1788).
[18] *See* Del. Const. of 1792, art. VIII, §2; *Id*. art. IV, §1; Md. Const. of 1776, art. XIV (1810); Ga. Const. of 1789, art. IV, §2; Pa. Const. of 1790, art. III, §2; Ky. Const. of 1792, art. III, §2; Tenn. Const. of 1796, art. III, §3; Ohio Const. of 1803, art. IV, §2; La. Const. of 1812, art. VI, §13.
[19] Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 921 (1993) (quoting 1 Harry A. Cushing, *The Writings of Samuel Adams* 185 (1904)); 1 Max Farrand, *The Records of the Federal Convention of 1787* 88 (1911); Hamilton, *The Federalist No. 81* 482 (1788); 1 Kermit L. Hall & Mark David Hall, *Collected Works of James Wilson* 712 (2007).

exercise their prescription power under the Elections Clause, thereby exercising their power to legislate, a power which owes its existence to the state constitutions, they do so subject to state constitutional limits.

There is no dispute that the states which comprise our union, including North Carolina, are constitutional governments. Thus, when the states legislate in general, and certainly when they legislate to administer federal congressional elections, they do so pursuant to authority which is limited by *their* constitutions. Similarly, to the extent that Petitioners allege judicial review to be an assumption inherent in constitutional government, they cannot escape the conclusion that *some* adjudicative entity is properly authorized to interpret and espouse the meaning of *those* constitutional constraints which, in the case of North Carolina, would derive from the North Carolina Constitution. And though Petitioners may deny it, we fail to see why the North Carolina judiciary can't be that entity. In fact, given that the Federal Judiciary is comprised entirely of courts of limited jurisdiction wherein the interpretation of state law is, by and large, normally avoided, it's hard to make the case that anything other the North Carolina judiciary could possibly be the proper entity to interpret the meaning of the state's own constitutional limitations.[20]

All that being said, we perceive two plausible alternatives that explain the framers' failure to mention state constitutional review in the Elections Clause: the first is that the framers intended the Elections Clause to free state legislatures from such scrutiny; the second is that, like with federal constitutional review, the notion that state legislatures would be constrained by their state constitutions in exercising their prescription power was an implicitly understood background assumption meriting no explicit mention. Only the former possibility can vindicate Petitioner's

[20] *See Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 151–54 (1908) (refusing to adjudicate a state law breach of contract claim without diversity jurisdiction or a well pleaded federal question); *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

expressio unius argument since only this scenario involves a deliberate choice by the framers to say "no" to the notion that state constitutions should constrain state legislatures in their exercise of Elections Clause power.[21] However, since historical circumstance does not foreclose the latter possibility, the *expressio unius* canon simply does not resolve the issue.

C.

As of yet, we have not determined what the nature of the prescription power under the Elections Clause actually is, we have merely explained why Petitioner's view of the matter is not as obvious as they claim. We now take an affirmative stance: the nature of the state legislatures' prescription power under the Elections Clause is the power to be the original architects, the "first movers," of the plan for conducting federal congressional elections, subject to federal and state constitutional limits. We believe this conclusion follows for two reasons: first, the evidence that the framers looked favorably on state constitutional review as a check on state legislative overreach substantially outweighs any evidence to the contrary; and second, the common law derogation canon demands clearer textual indication that the Elections Clause was meant to free state legislatures from state constitutional limits.[22]

As we have explained, circumstances evincing founding-era appreciation for constitutional limitations and judicial review as indispensable to the preservation of free government in light of the threat of legislative overreach is voluminous and powerful evidence that the Elections Clause should not be understood idly to codify an astonishing exception to this principle.[23] Additionally, practices contemporaneous with the founding and immediately ensuing decades demonstrates that

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[21] *Peabody Coal Co.*, 537 U.S. at 168; *Marx*, 568 U.S. at 381.
[22] *See Brown v. Barry*, 3 U.S. 365, 367 (1797); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959).
[23] *See The Federalist No. 48*, *supra*, at 308–309; *The Federalist No. 78*, *supra*, at 470; *See generally The Federalist No.51*; *The Federalist No. 47*, *supra*, at 301; Wood, *supra*, at 921; 1 Farrand, *supra*, at 88; *The Federalist No. 81*, *supra*, at 482; Hall & Hall, *supra*, at 712.

states did codify limitations on the power of their legislatures to regulate the process of conducting federal congressional elections in their constitutions.[24]

On the other hand, Petitioner's contrary evidence is suspect at best. Their strongest source of support, the so called Pinckney Plan, allegedly presented at the Philadelphia Constitutional Convention, would have delegated to the states, as opposed to the state legislatures, the power to prescribe the time, place, and manner of holding congressional elections.[25] Because this proposed language was allegedly rejected in favor of the Elections Clause actually in our Constitution, Petitioners argue this demonstrates the founding-era intent to free the state legislatures from their constitutions in the realm of congressional election administration.[26] Yet, scholarly review of the Pinckney Plan has cast considerable doubt on its authenticity and there is now substantial reason to believe that the Plan was never in fact presented at the Philadelphia Convention.[27]

Petitioners also rely on a statement by Alexander Hamilton in Federalist No. 59 that authority under the Elections Clause "must either have been lodged wholly in the national legislature, or wholly in the State legislatures…"[28] Yet, this statement needn't necessarily be read to suggest an intent to sever state legislatures from their own constitutional constraints. Hamilton, like the Elections Clause itself, did not mention federal constitutional limits, but Petitioners nonetheless concede that those limits would constrain the Elections Clause power even if it had been lodged "wholly in the national legislature."[29] Thus, what it apparently means for Elections Clause power

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[24] Del. Const. of 1792, art. VIII, §2; *Id*. art. IV, §1; Md. Const. of 1776, art. XIV (1810); Ga. Const. of 1789, art. IV, §2; Pa. Const. of 1790, art. III, §2; Ky. Const. of 1792, art. III, §2; Tenn. Const. of 1796, art. III, §3; Ohio Const. of 1803, art. IV, §2; La. Const. of 1812, art. VI, §13.
[25] 1 Farrand, *supra*, at 597.
[26] Pet'r['s] Br. 2.
[27] 1 John Franklin Jameson, *Studies in the History of the Federal Convention of 1787* 117 (1903); 3 Farrand, *supra*, at 595; William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787* 14 (1900).
[28] Hamilton, *The Federalist No. 59* 362 (1788).
[29] *See* Pet'r['s] Br. 2–3.

to be lodged "wholly in" a legislative body does not disclaim implicitly understood constraints imposed by the legislative body's founding charter. Consequently, were Elections Clause power indeed lodged "wholly in" the state legislatures, Hamilton's statement is perfectly consistent with implicitly understood limitations imposed by the states' respective constitutions.

The weight of the evidence against Petitioner is further fortified by the interpretive suggestion of the common law derogation canon. That canon counsels courts to construe statutes in derogation of the common law strictly such as to be in harmony with the common law as far as possible.[30] Admittedly, this canon has primarily been invoked in the interpretation of statutes as opposed to the Constitution itself and, even then, much less aggressively than was customary once upon a time. Nonetheless, we do not think these considerations foreclose its proper use in the present case. To the contrary, for several reasons, we think that the common law derogation canon holds significant water for the present occasion.

First, this court has given effect to the common law derogation canon as far back as 1797, a mere decade following ratification of the Constitution, and is thus an invaluable tool in interpreting that document by virtue of its contemporaneous judicial usage.[31]

Second, whatever may be said about the propriety of applying the common law derogation canon to insulate American common law doctrines that have developed well after ratification from textual usurpation; it is nonetheless clear that this court has guarded common law principles *deeply rooted in Anglo-American law* especially closely. Thus in *Morissette v. United States*, we declined to affirm the conviction of a scrapper indicted for conversion of spent government bomb casings absent a jury's determination of the requisite criminal intent, notwithstanding the statute's omission to mention such a requirement.[32] We described the "contention that an injury

[30] *Barry*, 3 U.S. at 367; *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).
[31] *Barry*, 3 U.S. at 367.
[32] *Morissette v. United States*, 342 U.S. 246, 247–50 (1952).

can amount to a crime only when inflicted by intention" as "no provincial or transient notion" but as having achieved "unqualified acceptance…by English common law in the Eighteenth Century…"[33] We explained that "Congressional silence as to mental elements in any Act merely adopting into…statutory law…a concept of crime already so well defined in common law…" did not authorize courts to read those deeply rooted elements out of statutory text by judicial initiative.[34] To do so, we insisted, demanded "affirmative instruction from Congress."[35]

Third, the particular context of constitutional interpretation actually augments, rather than diminishes, the influential effect of the common law derogation canon. This is because, at the time of ratification, the inference that the newly chartered government would bring with it common law expectations was especially strong. Indeed, at ratification, essentially by definition, there were practically no other legal norms but those furnished at common law. Thus, incorporation of common law assumptions would have been a necessary means of providing the newly created constitutional government with a framework on which to operate.

Consequently, there is even more reason to suppose that the Elections Clause, absent some affirmative instruction, was meant to prescribe a rule consistent with the common law expectation that chartered government entities are constrained by the terms of their own charters in all of their official actions and that the tribunals of those entities are empowered to interpret and enforce those constraints. The use of the common law derogation canon is thus useful, especially when we would otherwise be stuck with a hopeless ambiguity. In any case, we emphasize that our use of this canon here is merely to supplement the near decisive inference against Petitioner's view of the Elections Clause which the historical record discussed above already supplies.

[33] *Id.* at 250–51.
[34] *Id.* at 262–63.
[35] *Id.* at 273.

For present purposes, application of the common law derogation canon is just another means of corroborating the strength of the inference derived from the historical record. To the extent that the founders understood judicial review and constitutional limitation of legislative power to be a lynchpin feature of constitutional government, there is a strong common law presumption in favor of preserving that status quo. We refuse to construe the Elections Clause to upset that common law tradition, especially when its plain language is evidently amenable to an equally plausible interpretation that does not disentangle the common law fabric, as we have shown. In light of the fact that Petitioner's interpretation of the Elections Clause would do serious violence to the common law view, absent a clearer indication that state legislatures were meant to administer congressional elections free of their own constitutions, we instead adopt the interpretation which we have described as the first mover reading.

Applicant Details

First Name	**Joseph**
Last Name	**Charney**
Citizenship Status	**U. S. Citizen**
Email Address	**jpc2230@columbia.edu**
Address	**Address** **Street** **352 West 123rd Street Apt GA** **City** **New York** **State/Territory** **New York** **Zip** **10027** **Country** **United States**
Contact Phone Number	**9185103034**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**March 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Transnational Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court Student Editor and Coach for 1L LPW Course**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Schatz, Ben
bschatz@cfal.org
3145704504
Hu, June
huju@sullcrom.com
Recktenwald, Mark
jaye.m.atiburcio@courts.hawaii.gov
(808) 539-4700
Mitts, Joshua
joshua.mitts@law.columbia.edu
212-854-7797

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Joseph (Joe) Charney
2860 E. 33rd St.
Tulsa, OK 75105
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June 12, 2023

The Honorable David Steven Morales
United States District Court
Southern District of Texas
United States Courthouse
1133 North Shoreline Boulevard, Room 320
Corpus Christi, TX 78401

Dear Judge Morales:

I am a rising third-year student at Columbia Law School, and I write to apply for a clerkship in your chambers beginning in August 2024. As an Oklahoma native, I am eager to return to the America's heartland to practice law, and doing so in your chambers would be particularly meaningful for me. I come from Mexican heritage and learned Spanish at an early age.

I believe I am well equipped to hit the ground running as a clerk in your chambers. Last summer I interned for Chief Justice Mark Recktenwald at the Hawai'i Supreme Court, where I had the opportunity to write a draft opinion. Furthermore, this year I served as a teaching fellow for Columbia's 1L legal writing course and as a staff editor on a journal. Finally, this coming fall I will be externing for Judge Paul Engelmayer in the Southern District of New York. These experiences will allow me to excel as a clerk in your chambers.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Chief Justice Mark Recktenwald (808-579-4701, mark.e.recktenwald@courts.hawaii.gov); Lecturers-in-Law Ben Schatz (212-577-2523 ext. 544, bschatz@cfal.org) and June Hu (301-919-0462, huju@sullcrom.com); and Professor Joshua Mitts (212-854-7797, jmitts@law.columbia.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Joseph Charney

Joseph (Joe) Charney

JOSEPH (JOE) CHARNEY

2860 E. 33rd St. Tulsa, OK 74105 • jpc2230@columbia.edu • (918) 510-3034

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2024
Honors: Harlan Fiske Stone Scholar
Activities: Columbia OutLaws, Member
Columbia Journal of Transnational Law, Staff Editor
Foundation Year Moot Court, Student Editor
1L Legal Practice Workshop, Teaching Assistant
Outdoors Club, 2L Representative
Jewish Law Students Association, Judaism & Law Fellow

Northwestern University, Evanston, IL
B.S., *cum laude*, in Journalism and Psychology, received March 2020
Honors: Dean's List
Princeton in Latin America Fellow (cancelled due to COVID-19)
Activities: Northwestern Football Team (NCAA Div. I), Equipment Manager
Alpha Epsilon Pi Jewish Fraternity, President
"Perspectives" trip to Israel and the Palestinian Territories, Student Facilitator

EXPERIENCE

Hon. Judge Paul A. Engelmayer, U.S. District Court, Southern District of New York, New York, NY
Judicial Extern (Expected) September 2023 – December 2023

Gibson, Dunn & Crutcher, LLP, Los Angeles, CA May 2023 – July 2023
Summer Associate
Drafted research memorandum for appellate matter regarding substantial performance doctrine in California.

Center for Appellate Litigation, New York, NY January 2023 – May 2023
Extern
Drafted appellate brief on behalf of client convicted of felony assault. Researched issues relating to *pro se* applications and state constitutional law.

Hon. Chief Justice Mark E. Recktenwald, Hawai'i Supreme Court, Honolulu, HI
Judicial Intern May 2022 – July 2022
Composed and edited sections of certiorari memoranda for cases involving grand juries, contract formation, and constitutional amendments. Wrote recommendations to accept or deny certiorari applications. Researched defective charging instruments and conflicts between court rules and statutes. Wrote speech for the Chief Justice to deliver at swearing-in ceremony for district court judge.

Jaffe & Berlin LLC, Chicago, IL
Real Estate & Litigation Paralegal August 2020 – June 2021
Drafted, edited, and filed pleadings. Managed billing department. Assisted in discovery production.

Buenos Aires Times, Buenos Aires, Argentina
Editorial Fellow January 2020 – March 2020
Published articles about politics, the economy, and international affairs in English and Spanish.

Mexico Solidarity Network, Chicago, IL
Volunteer ESL Teacher April 2016 – March 2019
Taught weekly English classes to undocumented community in Chicago during winter and spring quarters.

ADDITIONAL INFORMATION

Language Skills: Spanish (proficient)
Kivunim Gap Year Study Program: (40-person cohort based in Jerusalem, Israel. Travelled to 13 countries to study and engage with the Jewish diaspora.) 2015 – 2016
Interests: Golf, Spikeball, LOST (TV show), Fantasy Football

Columbia
Law School

Registration Services

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CLS TRANSCRIPT (Unofficial)

06/02/2023 09:59:26

Program: Juris Doctor

Joseph P Charney

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A-
L6663-1	Ex. Criminal Appeals	Schatz, Ben A.; Zeno, Mark	2.0	A
L6663-2	Ex. Criminal Appeals - Fieldwork	Schatz, Ben A.; Zeno, Mark	2.0	CR
L6169-2	Legislation and Regulation	Briffault, Richard	4.0	B+
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-3	Corporations	Mitts, Joshua	4.0	A
L6241-1	Evidence	Shechtman, Paul	3.0	A-
L6272-1	Land Use	Ostrow, Ashira Pelman	3.0	CR
L6675-1	Major Writing Credit	Benally, Precious Danielle	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6683-1	Supervised Research Paper	Benally, Precious Danielle	2.0	CR
L6674-1	Workshop in Briefcraft [Minor Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	A-
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-16	Legal Practice Workshop II	McGinnis, Michael Charles; Moe, Alison	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	B+
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B+

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-3	Constitutional Law	Bulman-Pozen, Jessica	4.0	B+
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A-
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-16	Legal Practice Workshop I	McGinnis, Michael Charles; Moe, Alison; Whaley, Hunter	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 60.0

Total Earned JD Program Points: 60.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	Harlan Fiske Stone	1L

Writing Sample

The following writing sample is the first draft of an appellate brief that I wrote this semester in my capacity as an extern for the Center for Appellate Litigation. The appeal centers around a *Faretta* issue for a client convicted of felony assault and sentenced to an eight-year term of incarceration. I received approval from my supervising attorney Ben Schatz to use this draft as a writing sample with the names of parties redacted. This draft has not been edited in any form by anyone else. However, the substantive structure of the brief is the product of several discussions with Mr. Schatz and fellow externs. I have omitted two sections of the brief for length and clarity.

QUESTION PRESENTED

1. Did the lower court err in determining that [REDACTED] was incapable of knowingly and intelligently waiving his right to counsel because he was an immigrant from Yugoslavia who lacked legal expertise?

INTRODUCTION

[REDACTED] made a knowing and intelligent waiver of his right to counsel. The court below successfully admonished [REDACTED] of the gravity of his decision, and the record indicates that [REDACTED] understood and accepted the risks. The court nonetheless determined that, because of his unsatisfactory pedigree, [REDACTED] could not make a knowing and intelligent waiver. [REDACTED] is an immigrant from former Yugoslavia with only nine years of formal schooling and no trial experience. However, while the court was required to consider [REDACTED] pedigree as part of its inquiry into his capacity to intelligently waive counsel, the court treated his pedigree as dispositive. Despite a record that indicates [REDACTED] lucidly understood and appreciated the risks, the court ruled that [REDACTED] was incapable of intelligently and knowingly waiving of counsel.

The court then improperly buttressed its ruling with considerations that do not bear upon [REDACTED] capacity to appreciate the risk of proceeding pro se. By enumerating [REDACTED] lack of legal skills and citing unfounded concerns about his "demeanor," the court did what it thought was best for [REDACTED], rather than scrutinize the pertinent question before it: did [REDACTED] understand the risks of proceeding pro se? The record indicates that he did.

RELEVANT PROCEEDINGS

1. The court conducted a pro se colloquy.

[REDACTED] first requested to represent himself prior to voir dire. [Dec 8. Hearing, 8:74] In response, the court explained that it would conduct a colloquy to discuss the ramifications of self-representation and probe whether [REDACTED] "fully understood the significance and consequences." [*Id.*, 25:91]

First, the court explained that the right to counsel is guaranteed to all criminal defendants in the United States, regardless of their ability to pay. [*Id.*] The court then asked basic questions about [REDACTED] pedigree. [REDACTED] answered that he was a 54-year-old man from Yugoslavia with nine years of formal schooling and no trial experience. [*Id.*, 26:92] [REDACTED] then confirmed that he had no physical or mental conditions that would affect his ability to participate in a trial. [*Id.*, 27:93]

The court then reiterated the charges against [REDACTED] and the maximum prison sentence he faced. [*Id.*, 27:93] The court emphasized that "the average person, regardless of how intelligent or educated" will be at a disadvantage representing themselves. [*Id.*, 27-28:93-94] [REDACTED] responded that he understood. [*Id.*, 28:94] The court warned that the law "contains terms and concepts that a person, who has not studied the law, may not understand." [*Id.*] Thus, the court added, [REDACTED] may not be able to apply those terms and concepts to his case. [*Id.*] [REDACTED] admitted that he did not "know the law too much" but then confirmed that he understood he would be at a disadvantage. [*Id.*] The court warned

that [REDACTED] would "have to live with the consequences" of proceeding pro se and that he ran the risk of prejudicing himself against a jury. [*Id.*, 28-29:95-96] Again, [REDACTED] responded that he understood. [*Id.*]

The court also explained that [REDACTED] would be responsible for questioning witnesses and stressed that there were specific rules of evidence that governed the proper form and nature of the questions. [*Id.*, 30-31:96-97] The court warned that, because [REDACTED] did not know these rules, he may fail to exclude prejudicial evidence and ran the risk of framing questions in ways that made him appear guilty. [*Id.*] [REDACTED] responded that he understood. [*Id.*]

The court asked whether English was [REDACTED] first language. [*Id.*, 31:97] [REDACTED] responded that English was his second language, and then the court assured him that it understood him "well." [*Id.*] The court then explained to [REDACTED] that even lawyers customarily seek outside representation to refrain from prejudicing themselves against a jury. [*Id.*, 31-32:97-98] The court warned [REDACTED] that he would be held to the same standards as a professional attorney, despite his lack of training. [*Id.*, 32:98] The court also asked [REDACTED] whether he knew *Batson*, and [REDACTED] responded that he was not familiar with the case. [*Id.*, 33:99]

Near the end of the colloquy, the court asked [REDACTED] why he wanted to represent himself. [*Id.*, 34:100] [REDACTED] responded that he wanted to represent himself so that he could "examine the witnesses and tell my story." [*Id.*,

34:100] When pressed, [REDACTED] acknowledged that he did not know the legally proper way to conduct witness examination. [*Id.*, 35-36:101-102] The court informed [REDACTED] that he could not object to witness testimony on the basis that he believed the witnesses were lying. [*Id.*] [REDACTED] replied, "So what do I do?" [*Id.*, 36:102]

At this point, the court ended the colloquy and encouraged [REDACTED] to confer with counsel. [*Id.*] The court preliminarily ruled that [REDACTED] could not conduct jury selection because he did not "even know how it works." [*Id.*] The court did, however, grant [REDACTED] the opportunity to raise his own objections during the prosecutor's *Sandoval* application. [*Id.*] [REDACTED] responded, "I understand. I just need to represent myself, that's all. Everything else, I got no problem with." [*Id.*, 37:103]

2. The prosecutor raised a *Sandoval* application and [REDACTED] declined to object.

The *Sandoval* hearing took place immediately after the pro se colloquy. [Dec. 8 Hearing, 38:104] The prosecutor sought permission to cross examine [REDACTED] at trial about two prior drug-related felonies to impeach his credibility if he took the stand. [*Id.*, 40-41:106-107] When given the chance to object, [REDACTED] explained that he was not on trial for his past crimes and that he took no issue with the prosecutor's application. [*Id.*, 42:108] The court replied, "This is an example of where, as a non-lawyer, you're not familiar with the law." [*Id.*] [REDACTED] responded,

"No, I'm not familiar with the law. . .I'm familiar with my case." [*Id.*] The court subsequently directed [REDACTED] attorney to "answer the legal part of the question," and his counsel complied by raising objections. [*Id.*, 42-44:108-110] [REDACTED] did not speak again during the remainder of the *Sandoval* hearing.

3. The court denied [REDACTED] pro se request.

Five days later, the court acknowledged [REDACTED] pro se request as timely and voluntary but denied his application:

> "I do not find that the defendant here, [REDACTED], can make, or has made a knowing and intelligent waiver of his right to counsel. After consideration of his background, raised in a country where there is no similar jury system, education level there, none here, and lack of trial experience, I cannot find that [REDACTED] does appreciate the dangers and disadvantages inherent in giving up his right to counsel."

[Dec. 13 Hearing, 3:116] The court then expressed concern over apparent "outbursts" that took place during the *Sandoval* hearing. [*Id.*] The court did not specify what conducted constituted the "outburst."

However, the court then assured [REDACTED] that his behavior during the *Sandoval* hearing was not the "primary reason" for its ruling. [*Id.*, 3:116] The court explained that [REDACTED] lacked a "capacity to appreciate strategic decisions"; determined that [REDACTED] would be unable to question witnesses in a proper manner given his "simple" communication skills; and concluded that [REDACTED]

possessed "an inability to absorb, process, and apply basic but important legal concepts." [*Id.*, 4:117] The court, citing to the *Sandoval* hearing, also determined that [REDACTED] was unable to be "guided by" what might prejudice a jury against him. [*Id.*]

The court concluded, however, that [REDACTED] "expressed himself forcefully" in his pro se application. [*Id.*, 4:117] Thus, the court offered to allow extra time at trial for [REDACTED] to confer with counsel during witness examination. [*Id.*, 5:118]

4. [REDACTED] was found guilty of felony assault and sentenced to an eight-year term of incarceration.

[OMITTED]

ARGUMENT

THE LOWER COURT IMPROPERLY DENIED [REDACTED] HIS RIGHT TO GO PRO SE.

[REDACTED] made a timely and unequivocal request to represent himself, requiring the court to conduct a "searching inquiry" into whether his request was made knowingly and intelligently. A properly conducted inquiry will insulate even "rash" decisions to go pro se. *People v. Rogers*, 186 A.D.3d 1046, 1048 (2020) ("When the whole record memorializes the trial court's compliance with its core advisory function, then a defendant's choice to waive counsel must be respected, even if that decision is rash, foolish, or lethal.")[1] Here, the court complied with its "core advisory function," and the record indicates that [REDACTED] understood the court's warnings. Accordingly, the court violated [REDACTED] constitutional right and reversal is required. U.S. Const. amend. VI; N.Y. Const. art. I, § 6.

1. The Right to Go Pro Se in New York.

a. The constitutional right to self-representation is "cherished" in New York.

The right to self-representation is founded on the principle that the U.S. Constitution "does not force a lawyer upon a defendant." *Faretta v. California*, 422 U.S. 806, 815 (1975). A year before the Supreme Court in *Faretta* found the right to self-representation implicit in the sixth amendment, the New York Court of Appeals in

[1] Internal citations omitted for clarity.

McIntyre observed that the right was constitutionally recognized in New York. *People v. McIntyre*, 36 N.Y.2d 10, 14-15 (1974); N.Y. Const. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel ..."). The *McIntyre* court characterized the right to self-representation as "one of the most cherished ideals of our culture" grounded in "respect for individual autonomy." *McIntyre*, 36 N.Y.2d at 14-15. An improper denial of a pro se application requires reversal without regard to harmless error analysis. *See People v. Cherry*, 104 A.D.3d 468, 469 (1st Dept. 2013).

b. *McIntyre* requires courts to conduct a "searching inquiry" to ensure the decision to waive the right to counsel was knowing and intelligent.

The *McIntyre* court understood that the right to self-representation is not absolute. Criminal defendants may only invoke this right if (1) the request is unequivocal and timely asserted,[2] (2) the applicant knowingly, intelligently, and voluntarily waives his or her right to counsel, and (3) the applicant has not engaged in conduct which would prevent the fair and orderly exposition of the issues.[3] *Id.* at 17.

Once an applicant timely requests to proceed pro se, the second prong of the *McIntyre* analysis requires the court to conduct a "searching inquiry" to ensure that the

[2] N.Y. CPL §§ 1.20(11), 270.15(1); *see also People v. Crespo*, 32 N.Y.3d 176, 182-183 (2018) (holding that "commencement" in a jury trial, for determining whether a pro se application was timely, is upon the beginning of jury selection.) The court acknowledged that [REDACTED] request was timely and voluntarily made. [Dec 13. Hearing, 2:115] Accordingly, the first *McIntyre* prong is not in dispute.

[3] The court made no determination that [REDACTED] conduct would prevent the orderly exposition of the issues. Thus, the third *McIntyre* prong is not in dispute.

applicant is "aware of the dangers and disadvantaged of proceeding without counsel." *People v. Crampe,* 17 N.Y.3d 469, 481 (2011). The searching inquiry must "adequately" warn the defendant of the risks inherent in self-representation and apprise the defendant "of the singular importance of the lawyer in the adversarial system of adjudication." *People v. Arroyo*, 98 N.Y.2d 101, 104 (2002). Cursory warnings that self-representation is "not a good idea," or merely ensuring that the defendant understands the charges against him, is insufficient. *Arroyo*, 98 N.Y.2d 101 at 103; *People v. Allen*, 39 N.Y.2d 916, 917 (1976).

However, New York rejects the "application of any rigid formula" and instead endorses a "flexible inquiry" to determine whether the goal of effectively admonishing the applicant has been met. *Arroyo*, 98 N.Y.2d 101 at 103. *See also People v. Providence*, 2 N.Y.3d 579, 582 (2004) (endorsing a "totality of the circumstances" review for determining whether the waiver application was knowing and intelligent). Courts are required, however, to inquire into the applicant's age, education, occupation, and prior exposure to legal procedures, unless the record indicates that such facts were already apparent to the trial judge. *Providence*, 2 N.Y.3d 579 at 582. The import of these questions is to provide "a reliable basis" for appellate review, not to serve as rote formula for assessing pro se applicants. *Id.* at 584 (quoting *Arroyo*, 98 N.Y.2d 101 at 104). As such, regardless of the applicant's pedigree, "mere ignorance of the law cannot vitiate an effective waiver of counsel *as long as the defendant was cognizant of the*

dangers of waiving counsel at the time it was made." *McIntyre*, 36 N.Y.2d at 18 (emphasis added).

2. [REDACTED] made a knowing and intelligent waiver of his right to counsel.

a. The court adequately warned [REDACTED] of the risks of self-representation and [REDACTED] appreciated these risks.

The lower court comprehensively warned [REDACTED] of the dangers of waiving counsel. The court explained that he was entitled to counsel, described the unique role of a lawyer in the U.S. justice system, noted the gravity of the charges against him, and warned that he would be at a distinct disadvantage if he proceeded pro se. [Dec. 8 Hearing, 25:91, 27-28:93-94] These warnings described in detail the nature of the disadvantage he faced: prejudicing himself against the jury, failing to exclude unfavorable evidence, and being compared to expertly trained lawyers. [*Id.*, 30-32:96-98]

Nothing in the record suggests that [REDACTED] was incapable of understanding these risks. There was not a single instance where [REDACTED] expressed that he did not understand a warning nor where his desire to waive counsel wavered. At the end of the colloquy, [REDACTED] reiterated his stance: "I just need to represent myself, that's all." [*Id.*, 38:103] [REDACTED] never once "express[ed] a change of heart." *People v. Providence*, 2 N.Y.3d 579, 582 (2004) (holding that a waiver of counsel was effective because the trial judge "repeatedly and adequately" warned

the defendant and offered several opportunities for the defendant to "express a change of heart").

Additionally, [REDACTED] showed that he understood the detriments of self-representation by admitting he was unfamiliar with law on three occasions. [Dec. 8 Hearing, 28:94, 36:102, 42:108] Despite this, [REDACTED] "forcefully" pressed forward in his desire to represent himself. [Dec. 13 Hearing, 4:117] [REDACTED] understood he was not a legal expert but wanted to represent himself anyway so he could "tell his story" and "examine witnesses." [Dec. 8 Hearing, 37:103, 42:108, 34:100] An uncritical pro se applicant may not have understood that his role would include examining witnesses, but [REDACTED] understood what representing himself would entail and the main risk that came with it: ignorance of the law.

The court summarily dismissed [REDACTED] answers because it was unsatisfied with his pedigree. While the law mandates that courts inquire into a pro se applicant's age, education level, and prior exposure to trials, the purpose of such an inquiry is to determine whether the applicant was properly "made aware" of the ramifications self-representation and to ensure that reviewing courts have a "reliable basis" for review. *Faretta*, 422 U.S. at 835; *Arroyo*, 98 N.Y.2d 101 at 104. *See also Rogers*, 186 A.D.3d 1046 at 1048 (describing the "core" function of the searching inquiry as "advisory").

Courts do not require that pro se applicants demonstrate sterling pedigrees, only that applicants possess the mental capacity to understand and appreciate the

court's warnings—an objectively low bar. *See People v. Gilmore*, 157 N.Y.S.3d 617, 626-627 (2021) (using defendant's ability to recall his own birthday and social security number as evidence that he possessed the requisite "mental capacity"). The mandate in *McIntyre* is not that a lack of education is grounds for denial of a pro se application. *McIntyre*, 36 N.Y.2d at 17-18. If the colloquy demonstrates "repeated" references by the applicant to his own poor education and "language difficulties," then the applicant's pedigree may be grounds for rejecting a waiver of counsel. *See People v. Rodriguez*, 98 A.D.2d 961, 962 (1983).[4]

[REDACTED], however, discussed his education level and country of origin once, in direct response to the court's elicitation. [Dec 8. Hearing, 26:92] The court's assertion that [REDACTED] country of origin evidently does not have a similar jury system was never mentioned in the colloquy. The court nevertheless relied on this fact as a basis for its ruling, elevating it above the totality of the [REDACTED] answers and explanations. In doing so, the court embraced the very kind of "rigid formula" that *Arroyo* warned against. *Arroyo*, 98 N.Y.2d at 104.

Importantly, the court's searching inquiry confirmed that [REDACTED] had no physical or mental conditions that would constitute a "red flag." [Dec 8. Hearing, 27:93] *See People v. Stone*, 22 N.Y.3d 520, 528 (2014) (requiring courts to conduct a specialized inquiry when the pro se applicant displays "red flags" for mental illness);

[4] The defendant in *Rodriguez*, unlike here, was also equivocal in his desire to represent himself. *Rodriguez*, 98 A.D.2d 961 at 962.

see also People v. Zi, 178 A.D.3d 591 (2019) (highlighting that mental illness is a pedigree factor expressly suggestive of incapacity to appreciate risk). Here, the inquiry revealed that [REDACTED] was an immigrant from Yugoslavia who "expressed himself forcefully" in his pro se request. [Dec. 13 Hearing, 4:117] The court even conceded that it understood [REDACTED] "well." [Dec. 8 Hearing, 31:97] [REDACTED] was adequately warned of the ramifications of his decision, and his status as an immigrant from Yugoslavia without a formal education did not render his waiver ineffective.

b. The Court's ruling relied on improper considerations.

i. The court erroneously conflated [REDACTED] lack of legal expertise with his capacity to appreciate risk.

The court's ruling improperly gave considerable weight to [REDACTED] lack of legal acumen. Notwithstanding apparent concerns about his pedigree, the court spent the majority of its ruling discussing [REDACTED] lawyering abilities, which courts have repeatedly held are irrelevant to the inquiry of whether a waiver of counsel was knowing and intelligent. *See e.g.*, *McIntyre*, 36 N.Y.2d 10 at 17-18 ("mere ignorance of the law cannot vitiate an effective waiver of counsel"); *People v. Hall*, 856 N.Y.S.2d 360, 362 (2008) ("A court may not properly deny a defendant's request based on the court's perception that the defendant's legal skills are wanting.").[5]

[5] Internal quotations and citations omitted for clarity.

Here, the lower court ruled that [REDACTED] lacked a "capacity to appreciate strategic decisions"; determined that [REDACTED] would be unable to "question witnesses himself in a proper manner" given his "simple" communication skills; concluded that he possessed "an inability to absorb, process, and apply basic but important legal concepts"; and expressed concern that [REDACTED] "seems unable to be guided by consideration of what might prejudice a jury against him." [Dec. 13 Hearing, 4:117] Though not part of the court's formal ruling on [REDACTED] pro se request, the court also ruled that [REDACTED] could not conduct jury selection because he had never heard of *Batson* and did not "even know how it works." [Dec. 8 Hearing, 36:102]

The law does not require that pro se applicants demonstrate complex communication skills, an ability to strategize trial practices, an expertise in the federal rules of evidence, or knowledge of the inner workings of voir dire to make a knowing and intelligent waiver of counsel. A pro se applicant need only demonstrate an understanding of the risks inherent with waiving the right to counsel, and [REDACTED] repeatedly demonstrated such an understanding.

In particular, the court's determination that [REDACTED] was "unable" to be guided by what may prejudice a jury against him because he declined to object at the *Sandoval* hearing was unfair and inaccurate. [REDACTED] answered affirmatively to the court's *several* warnings that proceeding pro se would run the risk of prejudicing himself against the jury. [Dec. 8 Hearing, 29:95, 30:96, 31:97] [REDACTED]

understood that his prior record might prejudice a jury—he simply chose to accept this risk, much to the court's dismay: "This is an example of where, as a non-lawyer, you're not familiar with the law." [*Id.*, 42:108]

The court's response perfectly illustrates its conflation of legal expertise with capacity to appreciate risk. At the colloquy, the court chided [REDACTED] for not knowing the law because he declined to object. [*Id.*] However, in its ruling, the court determined that his decision not to object proved that [REDACTED] cannot be guided by risk. [Dec. 13 Hearing, 4:117] In any event, *McIntyre* does not require that pro se applicants *adhere* to the court's warnings, only that applicants understand and appreciate them. *Rogers*, 186 A.D.3d 1046 at 1049 ("The trial court's duty is to apprise the defendant of the risks and drawbacks of self-representation. The trial court's duty is not. . .to ensure that the defendant accepts the weight afforded those risks by the trial court, or by the legal establishment in general."). [REDACTED] did not need to be "guided" by risk to make a knowing and intelligent waiver. He only needed to understand that the risk existed.

The *Sandoval* hearing showed that [REDACTED] understood the risks of proceeding pro se and consciously accepted them. Unflinchingly, [REDACTED] stated, "I am not on trial for my record" in response to the prosecutor's motion. [*Id.* 42:108] The *Sandoval* hearing, if anything, highlighted that [REDACTED] was acutely aware of the nature of the proceedings against him. Most critically, the *Sandoval*

hearing underscored the reason why [REDACTED] chose to go pro se in the first place: to tell his own story. [*Id.*, 34:100]

The court erred in assessing [REDACTED] lawyering abilities and trial strategy as part of its ruling. Courts have wide discretion in asking pointed questions to dissuade pro se applicants from waiving counsel, but not all questions bear upon the applicant's capacity to appreciate risk. Asking complex legal questions about *Batson* and the proper form of objecting to witness testimony was well within the court's discretion. However, relying on answers to these formalistic questions as evidence of [REDACTED] incapacity to understand the dangers of waiving his right to counsel was improper.

ii. The court improperly and inaccurately relied on [REDACTED] pre-trial demeanor.

[OMITTED]

Applicant Details

First Name	**Boston**
Middle Initial	**C**
Last Name	**Mallory**
Citizenship Status	**U. S. Citizen**
Email Address	**boston.mallory@stcl.edu**
Address	**Address** Street **4310 Dunlavy Street, #531** City **Houston** State/Territory **Texas** Zip **77006** Country **United States**
Contact Phone Number	**8176820934**

Applicant Education

BA/BS From	**Wake Forest University**
Date of BA/BS	**May 2020**
JD/LLB From	**South Texas College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=74405&yr=2011**
Date of JD/LLB	**May 12, 2023**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**South Texas Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William and Mary Spong Tournament 2022** **Regent Hassle Constitutional Law Tournament 2021**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Cureton, Jeffrey
Judge_Cureton@txnd.uscourts.gov
Goodman, Maxine
mgoodman@stcl.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Boston C. Mallory
4310 Dunlavy Street #531
Houston, TX 77006
Boston.mallory@stcl.edu
817.682.0934

January 31, 2023

The Honorable David S. Morales
U.S. District Court for the Southern District of Texas
1133 N. Shoreline Boulevard
Corpus Christi, Texas 78401

Dear Judge Morales:

My name is Boston Mallory. In May of 2023, I will graduate from South Texas College of Law. Following my graduation, I will be clerking for the Honorable Lee Ann Reno in the Northern District of Texas for the 2023-2024 term. I would like to be considered for a position as your law clerk for the 2024-2025 term. My plans following my clerkship with Judge Reno are uncertain at this time, but I would like to practice commercial litigation with a focus on oil and gas. I have enclosed my application materials herein.

Since starting law school, I have taken every opportunity to enhance my legal writing skills. I have been able to advance my academic writing through my membership on the South Texas Law Review, my appellate brief writing through my participation on the South Texas Varsity Moot Court team, and my trial brief/motion writing through my time clerking at a boutique litigation firm. And I believe my time clerking for Judge Reno will help me hit the ground running in your chambers. At South Texas, I am also the Vice President of the Federalist Society. Outside of the classroom, I like to spend my time hunting, playing golf, and watching Wake Forest sports.

This position is particularly appealing to me for a couple reasons. First, I was born and raised in Texas and have every intention of staying in Texas following my graduation. Second, it would be an honor to have the opportunity to clerk for a district judge with such a strong reputation right here in my home state. I am an extremely hard-working and detail-oriented individual and I know I would be an asset in your chambers.

I am available for an interview at your convenience. Please contact me should you have any questions or require any additional materials. Thank you for your consideration.

Respectfully,

Boston Mallory

Boston C. Mallory

4310 Dunlavy Street #531 | Houston, Texas 77006 | 817-682-0934 | Boston.mallory@stcl.edu

Education

South Texas College of Law Houston Houston, Texas
Juris Doctorate, May 2023
GPA: 3.762 **Rank:** Top 10%
Journal: South Texas Law Review, *Member*
Oil & Gas Energy Newsletter, *Managing Editor*
Advocacy: Varsity Moot Court, *Advocate*
Advanced Appellate Practice, *Moot Court Brief Writer*
Honors: Order of the Lytae, *Member*
Dean's Honor List, *Recipient*, all semesters
Presidential Fellow, *Member*
Langdell Scholar, *Constitutional Law Teaching Assistant*

Wake Forest University Winston Salem, North Carolina
Bachelor of Arts in Economics, May 2020

Universitat Autonoma de Barcelona, Barcelona, Spain
Economics and Catalan, Fall 2018

Work Experience

Zehl & Associates, PC
Law Clerk, February 2021 – August 2021, July 2022 – April 2023 Houston, Texas

- Assist lawyers with trial preparation through all phases of civil litigation: draft petitions, motions, discovery, deposition outlines, and demand letters
- Extensive experience drafting a variety of trial briefs and motions
- Deposed a fact witness in a Jones Act case and defended deposition of time value of money expert
- Supervised Practice Card

Fee, Smith, Sharp & Vitullo LLP Dallas, Texas
Summer Law Clerk, May 2022 – June 2022

- Researched matters involving insurance defense and commercial business disputes; including, fraud, misrepresentation, and ERISA claims
- Drafted internal research memoranda, deposition summaries, discovery requests, trial briefs, and motions

Donato, Brown, Pool & Moehlmann, PLLC Houston, Texas
Law Clerk, January 2022 – April 2022

- Drafted motions for summary judgment, motions to exclude/limit expert testimony, etc.

United States District Court, Northern District of Texas
Judicial Intern to Magistrate Judge Jeffrey L. Cureton, June 2021 – July 2021 Fort Worth, Texas

- Researched and drafted opinions on Social Security Appeals
- Conducted legal research for different types of hearings

Hobbies & Interests

- Playing golf
- Bird hunting
- Exercising
- Listening to Texas country music

(/StudentSelfService/)

Boston Mallory

Student Academic Transcript

Academic Transcript

Transcript Level	Transcript Type
Law	Web

Student Information | Degree Awarded | Institution Credit | **Transcript Totals**

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Curriculum Information

Current Program : Juris Doctor

Program

Law Student

Degree Awarded

Awarded	Degree Date
Juris Doctor	05/13/2023

Curriculum Information

Primary Degree

Program

Law Student

Institution Credit

Term : Fall 2020

Academic Standing

No Standing

Additional Standing

Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	201	Main	LW	Criminal Law	A-	3.000	11.001	
LAW	202	Main	LW	Contracts I	A-	3.000	11.001	
LAW	203	Main	LW	Torts I	B+	3.000	9.999	
LAW	204	Main	LW	Legal Research & Writing I	B+	3.000	9.999	
LAW	205	Main	LW	Civil Procedure I	A	3.000	12.000	
LAW	563	Main	LW	Introduction to Law Study	P	1.000	0.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	15.000	54.000	3.600
Cumulative	16.000	16.000	16.000	15.000	54.000	3.600

Term : Spring 2021

Academic Standing

Good Standing

Additional Standing

Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	206	Main	LW	Torts II	A-	3.000	11.001	
LAW	207	Main	LW	Property I	B+	3.000	9.999	
LAW	208	Main	LW	Contracts II	B+	3.000	9.999	
LAW	210	Main	LW	Legal Research & Writing II	A	2.000	8.000	
LAW	565	Main	LW	Civil Procedure II	A	3.000	12.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	14.000	14.000	14.000	14.000	50.000	3.571
Cumulative	30.000	30.000	30.000	29.000	104.000	3.586

Term : Fall 2021

Academic Standing
Good Standing

Additional Standing
Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	209	Main	LW	Constitutional Law	A+	4.000	17.332	
LAW	212	Main	LW	Property II	A	3.000	12.000	
LAW	213	Main	LW	Evidence	A-	3.000	11.001	
LAW	361	Main	LW	Moot Court A	HP	1.000	0.000	
LAW	419	Main	LW	Law Review A	HP	0.000	0.000	
LAW	579	Main	LW	Advanced Appellate Practice A	A	3.000	12.000	
LAW	581	Main	LW	Oral Persuasion	HP	1.000	0.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	13.000	52.333	4.026
Cumulative	45.000	45.000	45.000	42.000	156.333	3.722

Term : Spring 2022

Academic Standing
Good Standing

Additional Standing
Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	211	Main	LW	Federal Income Taxation	A-	3.000	11.001	
LAW	214	Main	LW	Professional Responsibility	A	3.000	12.000	
LAW	222	Main	LW	Insurance Law	A	2.000	8.000	
LAW	224	Main	LW	First Amendment Law	A	2.000	8.000	
LAW	362	Main	LW	Moot Court B	HP	1.000	0.000	
LAW	420	Main	LW	Law Review B	HP	1.000	0.000	
LAW	585	Main	LW	Advanced Appellate Practice B	A	3.000	12.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	13.000	51.001	3.923
Cumulative	60.000	60.000	60.000	55.000	207.334	3.770

Term : Fall 2022

Academic Standing
Good Standing

Additional Standing
Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	227	Main	LW	Oil, Gas, & Mineral Law	B+	3.000	9.999	
LAW	234	Main	LW	Family Law	B-	3.000	8.001	
LAW	236	Main	LW	Criminal Procedure	A-	4.000	14.668	
LAW	321	Main	LW	Administrative Law	A	3.000	12.000	
LAW	390	Main	LW	Insurance Law Seminar	A	2.000	8.000	
LAW	421	Main	LW	Law Review C	HP	1.000	0.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	15.000	52.668	3.511
Cumulative	76.000	76.000	76.000	70.000	260.002	3.714

Term : Spring 2023

Academic Standing
Good Standing

Last Academic Standing
Good Standing

Additional Standing
Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	240	Main	LW	Bar Preview Program	A+	2.000	8.666	
LAW	310	Main	LW	Professional Sports Law	B+	2.000	6.666	
LAW	320	Main	LW	Remedies	A-	3.000	11.001	
LAW	422	Main	LW	Law Review D	HP	1.000	0.000	
LAW	517	Main	LW	TX Oil, Gas and Land Title	A	2.000	8.000	
LAW	542	Main	LW	Advanced Legal Research Skills	A+	2.000	8.666	
LAW	558	Main	LW	Transactional Skills Oil & Gas	A+	3.000	12.999	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	14.000	55.998	4.000
Cumulative	91.000	91.000	91.000	84.000	316.000	3.762

Transcript Totals

Events

Order of Lytae
Spring 2022

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	91.000	91.000	91.000	84.000	316.000	3.762
Total Transfer	0.000	0.000	0.000	0.000	0.000	0.000
Overall	91.000	91.000	91.000	84.000	316.000	3.762

Boston C. Mallory
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Writing Sample

Description:

This is an excerpt from a trial brief I wrote for a partner while working at an insurance defense firm. The brief is about the admissibility of certain expert witness experiments according to Texas law. Specifically, this piece of writing is a memorandum of authorities advocating for admitting an expert's car accident reconstruction videos. The firm was representing the commercial vehicle driver and his company after a car accident. I changed the names of the relevant individuals for the sake of confidentiality. The exhibits are not included within this sample, but the brief will still make sense without reading/seeing the contents of each exhibit.

Supporting Exhibits

EXHIBIT A: Accident Reconstruction Tape #1: Moving Vehicles

EXHIBIT B: Accident Reconstruction Tape #1: Stationary Vehicles

EXHIBIT C: Affidavit of John Doe

EXHIBIT D: Forensic Accident Reconstructionist John Doe's C.V.

EXHIBIT E: John Doe's Accident Reconstruction Report

I. Introduction

Mr. John Doe is a forensic accident reconstruction expert who is qualified to create a reenactment of this vehicular accident. In the present case, a minor side-swipe impact occurred between Plaintiff's sedan and the trailer being pulled by Defendant. Mr. Doe was retained to conduct the exact same vehicular collision. He bought the exact same make and model of Plaintiff's vehicle. He then obtained the exact same trailer as was involved in the event in question. Mr. Doe then used his training, knowledge, and experience, including but not limited to his expert abilities as an accident reconstructionist, to apply the accepted scientific methodology of accident reconstruction to the pertinent facts of the present case to create the video reenactments attached hereto as Exhibits A and B.[1]

These video reenactments of the force and velocity of the vehicles are not only admissible, but extremely helpful to the medical physicians tasked with addressing the issue of medical causation. Both Defendant's retained board-certified neurosurgeon and the retained board-certified orthopedic expert have relied upon these two videos in reaching their opinions regarding medical causation, or the lack thereof. These video reenactments of the underlying accident are helpful to the jury, are not misleading, and should be admitted based on Texas case law precedent.

[1] EXHIBIT A; EXHIBIT B.

II. Legal Arguments and Authorities

A. John Doe is a qualified forensic accident reconstructionist, and his methods are based upon a reliable foundation.

For an expert's testimony and resulting work product to be admissible, the expert witness must be qualified to testify about "scientific, technical, or other specialized knowledge," TEX. R. EVID. 702, and the testimony must be relevant and based upon a reliable foundation. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002). An expert's opinion is relevant when it could assist the jury in determining an issue or assist in understanding other evidence. TEX. R. EVID. 702.

Mr. Doe has been an accident reconstructionist since 1993.[2] He has a number of certifications, including ACTAR (Accredited Commission for Traffic Accident Reconstruction), Traffic Accident/Homicide Investigation, Crash Data Retrieval System Operator, among others related to traffic accident reconstruction.[3] He is also a published author in the field of accident reconstruction and regularly conducts training and continuing engineering education so as to stay abreast of current methods and testing within the accident reconstruction industry.[4] In addition, he regularly lectures on accident reconstruction at Texas College for the Department of Forensic and Scientific Investigation.[5] There is no question that Mr. Doe is qualified as an accident reconstructionist in Texas.

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[2] EXHIBIT D.

[3] *See* EXHIBIT C; *see also Accredited Commission for Traffic Accident Reconstruction*, (Feb. 22, 2022, 9:00 AM), https://actar.org/ ("ACTAR offers an independent credentialing examination that objectively assesses a candidate's comprehension and application of minimum training standards of a forensic specialist in the field of motor vehicle accident investigation and reconstruction.").

[4] EXHIBIT D.

[5] EXHIBIT D.

To determine the admissibility of expert testimony under Rule 702, the Texas Supreme Court has enumerated a list of several non-exhaustive factors. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). These factors include the following:

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
> (3) whether the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the non-judicial uses which have been made of the theory or technique.

Id.

The Texas Supreme Court has emphasized these factors are non-exhaustive and will not fit every scenario. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). And it is well established that these factors are particularly difficult to apply in cases involving accident reconstruction. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007) (citing *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 802 (Tex. 2006)); *Gammill*, 972 S.W.2d at 727. Even so, when these factors are applied to the present case, they are all met.[6]

Mr. John Doe's methodology is well-established in the field of accident reconstruction science.[7] His methods for reenacting the accident are standard practice for accident reconstruction followed by numerous other experts and car companies when doing their crash testing.[8] Mr. Doe carefully analyzed the facts of the underlying case, used the exact same model of vehicles that

[6] EXHIBIT C.

[7] *See* EXHIBIT E at 4 ("My reconstruction practices are based upon the accepted methods as published in the Society of Automotive Engineers and numerous reconstruction treatises.").

[8] EXHIBIT E; *see also* C. Brian Tanner, Dennis A. Guenther, and John F. Wiechel, *Vehicle and Occupant Response in Heavy Truck to Passenger Car Sideswipe Impacts*, Society of Automobile Engineers International, Technical Paper Series (2001) (explaining the accepted methods for accident reconstruction); *see also* Daniel Fittanto, Cleve Bare, James Smith, and Chimba Mkandawire, *Passenger Vehicle Response to Low-Speed Impacts Involving a Tractor-Semitrailer*, Society of Automobile Engineers International (2011) (same).

were involved in the actual accident, and made scientific calculations so as to recreate a collision as close to the underlying accident as possible. In doing so, he successfully replicated the impact in this case to a point that what we see on tape is "extremely similar" to the impact which is the basis for this lawsuit.

But specifically, as to experts and accident reconstruction, Texas courts have held it to be more appropriate to analyze whether the expert's opinion actually fits the facts of the case. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010) (quoting *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904-05 (Tex. 2004)). Essentially, the court should determine whether there are any significant analytical gaps in the expert's opinion that undermine its reliability.

Expert testimony becomes unreliable when "there is simply too great an analytical gap between the data and the opinion proffered." *Ledesma*, 242 S.W.3d at 39. The trial court's task is not to determine whether the expert's conclusions are correct; instead, the court must determine whether the analysis the expert used to reach those conclusions is reliable and therefore admissible. *Zwahr*, 88 S.W.3d at 629 (citing *Gammill*, 972 S.W.2d at 728).

B. Accident reconstruction videos are admissible in Texas as long as they are substantially similar to the underlying accident and will not confuse the jury.

To properly admit demonstrative evidence, such as an accident reenactment, a trial attorney must meet three requirements: 1) the demonstrative evidence must relate to the admissible substantive evidence; 2) the demonstrative evidence must fairly and accurately reflect the substantive evidence; and 3) that proof must aid the trier of fact in understanding or evaluating the substantive evidence. *See Goth v. Continental Oil Company,* 678 F. 2d 593, 596 (5th Cir. 1982).

In Texas, it is well settled that when an experiment or demonstration is conducted out of court and out of the presence of opposing counsel, the evidence offered must be *"substantially similar"* to the actual facts of the case. *Horn v. Hefner*, 115 S.W.3d 255, 256 (Tex. App.—

Texarkana 2003, no pet.); *Fort Worth and Denver Railway Company v. Williams,* 375 S.W.2d 279, 281-282 (Tex. 1964). The conditions depicted in a video presentation do not need to be identical to the facts of the contested case. *Horn*, 115 S.W.3d at 256. When dissimilarities exist but are minor or easily explained to the jury, the admission of the experiment is within the trial court's discretion. *Id.* at 257. It is within the discretion of the trial court to determine whether the existence of a dissimilarity causes evidence of the experiment to confuse rather than aid the jury. *Id.*; *Williams*, 375 S.W.2d at 282; *Sosa by and through Grant v. Koshy,* 961 S.W. 2d 420, 430 (Tex. App.—Houston [1st District] 1997, pet. denied).

The standard requiring a "substantial similarity" between the experiment and the actual event was first developed in *Fort Worth and Denver Railway Company v. Williams*. 375 S.W.2d at 281. In *Williams,* a collision between an automobile and a train caused the death of the plaintiff. *Id.* at 280. Fort Worth Railway introduced into evidence a motion picture film of an experiment conducted by their attorney. *Id.* at 281. The experiment attempted to demonstrate that a beam of light similar to one emitted by a locomotive would cause a "wall of light," obstructing the view of a driver approaching the beam. *Id.* The court of civil appeals held that the admissibility of the experiment testimony was within the trial court's discretion because the differences between the experiment and the actual event were minor and could be explained to the jurors without confusing them. *Id.* at 279.

The Texas Supreme Court overruled the court of civil appeals in *Williams* and determined the experiment by the attorney was not substantially similar to the actual accident and had the potential to confuse the jury. *Id.* at 282-83; *see also Horn*, 115 S.W.3d at 257 ("In *Williams*, there was no explanation to the jury concerning the difference between the video and the actual event.").

But in doing so, the Texas Supreme Court acknowledged that so long as the reenactment is "substantially similar" to the circumstances of the underlying accident, and it can be presented without confusing the jury, the video should be admitted. *Id.* at 282.

Accident reconstruction videos are frequently admitted in Texas courts. In *Garza v. Cole*, the Houston 14th District Court of Appeals upheld video footage of an experiment being admitted at trial. 753 S.W.2d 245, 247 (Tex. App.—Houston [14th District] 1987, writ ref'd n.r.e.). The video in *Garza* was an accident reconstruction video reenacting the accident made the basis for the lawsuit. *Id.* There, the court held that the trial court properly admitted the videotape of the accident scene prepared by motorist's expert based on similarity of conditions in the tape as compared to the day of the accident. *Id.* at 245. In coming to its conclusion, the appellate court determined the video was effectively bolstered by eyewitnesses and the jury was well-suited to evaluate and place the video into perspective. *Id.* at 248.

Determining if an accident reconstruction reenactment should be admitted into trial often hinges on whether the differences between the experiment and the actual event are going to be explained to the jury during trial. *Horn*, 115 S.W.3d at 257. Several courts have addressed the issue of whether an experimental reenactment was substantially similar to the actual event and focused their reasoning on whether admitting the experiments would confuse the jury. *See Sosa by and Through Grant v. Koshy*, 961 S.W.2d 420, 430 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (holding trial court did not abuse its discretion because expert was cross-examined about differences between video and actual accident); *see also Garza v. Cole*, 753 S.W.2d at 247 (holding no abuse of discretion because there was testimony explaining differences between video and actual event). Video reenactments, reconstructing accidents, are admissible as long as they are

substantially similar to the underlying accident and the differences can be explained to the jury without causing confusion.

C. Doe's accident reconstruction videos should be admitted because they are extremely similar to the underlying accident and will not confuse the jury.

John Doe's accident reenactments were more than substantially similar to the underlying accident and should be admitted.[9] In his reenactments, Doe used the exact truck-tractor and trailer combination (including the exact same trailer) and an exemplar of the sedan which was the same make, year and model as Plaintiff's vehicle.[10] The damage to the exemplar after Doe's reenactment is nearly identical to the pictures of the damage to the Plaintiff's sedan that was involved in the underlying accident.[11] The sedan in the reenactment was equipped with a triaxial accelerometer and a roll rate sensor on the center tunnel of the vehicle near the center of gravity.[12] And the driver of the sedan was instrumented with a 9-channel head array, triaxial accelerometer at the thoracic and lumbar position.[13] Defendant was even the driver of the semi-truck pulling the trailer in the reenactment video.[14] Mr. Doe's accident reconstruction methods are commonly used

[9] *See* EXHIBIT E (describing in detail the methodology Doe implemented in conducting the accident reenactment).

[10] *See* EXHIBIT E (The sedan from the actual accident was not accessible, but Doe obtained the same make and model of car as the exemplar vehicle for his reenactment. The exemplar is still available for any testing or examination at "The Lot.").

[11] *Compare* EXHIBIT B at 4; *with* EXHIBIT B at 8 (showing nearly identical damage to the vehicle from the actual crash and the exemplar used by Doe in his reenactment).

[12] *See* Kathleen A. Rodowicz, Kenneth Dupon, Janine Smedley, Christine Raasch, Chimba Mkandawire, Daniel Fittanto, Cleve Bare, and James Smith, *Passenger Vehicle Occupant Response to Low-Speed Impacts with a Tractor-Semitrailer*, Society of Automobile Engineers International (2011) (using the exact same instrumentation in their experiment as Doe used in his video reenactment).

[13] *See id.*

[14] EXHIBIT E at 8.

and accepted in accident reconstruction science.[15] For these reasons, Mr. Doe's accident reconstruction videos should be admitted.

[15] *See* Kathleen A. Rodowicz, Kenneth Dupon, Janine Smedley, Christine Raasch, Chimba Mkandawire, Daniel Fittanto, Cleve Bare, and James Smith, *Passenger Vehicle Occupant Response to Low-Speed Impacts with a Tractor-Semitrailer*, Society of Automobile Engineers International (2011); *see also* EXHIBIT E at 4 (describing Doe's methodology for the reenactment and his reliance on the specific facts of this case).

Applicant Details

First Name	**Eliza**
Last Name	**Powers**
Citizenship Status	**U. S. Citizen**
Email Address	**cpowers5@illinois.edu**
Address	**Address** Street **11 Colony West Dr** City **Champaign** State/Territory **Illinois** Zip **61820** Country **United States**
Contact Phone Number	**6172793791**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Illinois, College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp**
Date of JD/LLB	**May 15, 2024**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**Elder Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Leipold, Andrew
aleipold@illinois.edu
(217) 333-1955
Jones, Robert
rojo28403@yahoo.com
910-679-2000
Wexler, Lesley
lmwexler@illinois.edu
2172443449

This applicant has certified that all data entered in this profile and any application documents are true and correct.

C. ELIZA POWERS

11 Colony West Dr., Champaign, IL 61820 | 617-279-3791 | cpowers5@illinois.edu

Friday, June 9, 2023

The Honorable David Steven Morales
U.S. District Court for the Southern District of Texas
1133 N. Shoreline Blvd.
Corpus Christi, TX 78401

Dear Judge Morales,

I am a rising third-year law student at the University of Illinois College of Law. I am writing to apply for a clerkship in your chambers for the 2024-2025 and the 2024-2026 terms. Having grown up in Seabrook and Austin and with family in Corpus Christi, San Antonio, and Houston, I am thrilled by the opportunity to return to home and work in your chambers.

During the summer of 2022, I externed with the Honorable Robert Jones, Jr. in the Eastern District of North Carolina, which largely inspired my interest in clerking. In this role, I conducted extensive research on complex civil litigation issues, in addition to a variety of criminal issues. This experience allowed me write memoranda and recommendations regarding sentencing relief due to alleged ineffective assistance of counsel, a concern I am highly interested in given my volunteer work at the Danville Correction Center in Illinois. As a member of the Illinois Trial Team, I have also honed my oral advocacy and evidentiary skills, ultimately winning a national championship in the field. Additionally, my experience taking a Judicial Opinion Writing class provided me the opportunity to write bench memos and draft opinions. These experiences have all contributed to my ability to think and write about nuanced legal issues.

Enclosed please find a copy of my resume, my most recent transcript, my undergraduate transcript, and two writing samples. One writing sample is an order that I wrote for Judge Robert Jones, Jr. last summer that was wholly adopted by the court, included with his permission. The second is an excerpt from my journal note concerning the constitutionality of residency requirements in physician-assisted suicide statutes. Finally, letters of recommendation from Judge Robert Jones Jr., Professor Andrew Leipold, and Professor Lesley Wexler are included.

If you have any questions, please feel to contact me at the above address and phone number. Thank you very much for considering my application.

Yours sincerely,

Eliza Powers

C. ELIZA POWERS

11 Colony West Dr., Champaign, IL 61820 | (617) 279-3791| cpowers5@illinois.edu

EDUCATION

The University of Illinois College of Law August 2021 – May 2024

J.D. Candidate, GPA: 3.61/4.0, *Top 20%, Dean's List, Harno Scholar (Top 10% Spring 2023)*

- Trial Team, *Competitor*
- 2023 National Ethics Trial Competition, *National Champion*
- Paul M. Lisneck Award for Excellence and Ethics in Trial Advocacy, *Finalist*
- *Elder Law Journal*, *Associate Editor*
- Women's Law Society, *Member*

The University of Texas at Austin August 2014 – May 2018

B.A. in International Relations & Global Studies, GPA: 3.66/4.0

- Academic Honors: University Honors, *Dean's List 2014-2018*, Phi Kappa Phi
- Studied abroad at the University of Copenhagen, Copenhagen, Denmark and at National Cheng Kung University, Tainan, Taiwan through the US-Taiwan Ambassador Scholarship

WORK EXPERIENCE

Vinson & Elkins LLP, Houston, TX – *Summer Associate* May 2023 – July 2023

- Wrote memoranda on complex issues in large international arbitration
- Drafted brief in support of motion for summary judgement and other pre-trial documents
- Working on pro bono projects concerning immigration asylum claims
- Looking forward to working with the firm's environmental and M&A practices during the remaining months as a summer associate

United States District Court for the Eastern District of North Carolina, Wilmington, NC

Judicial Extern to the Honorable Robert B. Jones, Jr. May 2022 – July 2022

- Prepared memoranda and recommendations regarding hearing outcomes
- Assisted in legal research in support of orders for both civil and criminal issues
- Observed courtroom proceedings, including arraignments, sentencings, settlements, and detention hearings
- Participated in settlement conferences regarding civil matters

Gerson Lehrman Group, Austin, TX – *Team Leader (Previously Research Manager, Senior Associate)* July 2018 – June 2021

- Managed a team of 13 associates, coordinating with departments and upper management
- Acted as first line of defense for all China-related compliance sensitivities for entire US client-facing organization
- Handled all China-focused projects, contracts totaling over $200 million, for financial services firms
- Evaluated team's progress through performance management, goal setting & tracking
- Participated in developing and improving a pilot international team between Austin & Shanghai
- Created and implemented a new workflow for inter-departmental collaboration to increase efficiency throughout the firm
- Raised over $7,000 for NAACP & Loveland Foundation through online auctions

VOLUNTEER EXPERIENCE

Education Justice Project, Danville, IL – *Math & Writing Partner* October 2021 – Present

- Provide writing tutoring to incarcerated students at Danville Correctional Center

LANGUAGES & INTERESTS

Languages: Advanced German, Intermediate Mandarin

Interests: Downhill skiing, training for half-marathons, New England Patriots, (poorly) attempting NYT crosswords

UNIVERSITY OF ILLINOIS URBANA - CHAMPAIGN

Urbana, Illinois 61801

Student Name: **Powers, Carolyn E**

University ID: **652380334** **Issue Date:** **08 - Jun - 23**

Level: **Law - Urbana-Champaign** **Day - Month of Birth:** **15 - Jul**

Most Recent Program(s)
College : Law
Major : Law

INSTITUTION CREDIT:

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2021 - Urbana-Champaign						
Law						
Law						
LAW	601	Contracts	4.00	A	16.00	
LAW	602	Property	4.00	B	12.00	
LAW	604	Criminal Law	4.00	B+	13.32	
LAW	609	Legal Writing & Analysis	2.00	B+	6.66	
LAW	627	Legal Research	1.00	C+	2.33	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 50.31 GPA: 3.35						
Spring 2022 - Urbana-Champaign						
Law						
Law						
LAW	603	Torts	4.00	B+	13.32	
LAW	606	Constitutional Law I	4.00	B+	13.32	
LAW	607	Civil Procedure	4.00	A	16.00	
LAW	610	Introduction to Advocacy	3.00	B+	9.99	
LAW	792	Fund of Legal Practice	1.00	S	0.00	
Ehrs: 16.00 GPA-Hrs: 15.00 QPts: 52.63 GPA: 3.50						
Deans List						
Summer 2022 - Urbana-Champaign						
Law						
Law						
LAW	692	Summer Externships	4.00	S	0.00	
Ehrs: 4.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Fall 2022 - Urbana-Champaign						
Law						
Law						
LAW	600	Pro Bono Service	0.00	S	0.00	
LAW	605	Criminal Proc: Investigation	3.00	A-	11.01	
LAW	682	Evidence	3.00	A	12.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAW	694	Trial Advocacy	2.00	A-	7.34	
LAW	694	Trial Team	2.00	A	8.00	
LAW	695	Trial Advocacy Workshop	3.00	S	0.00	
LAW	696	Elder Law Journal	1.00	S	0.00	
Ehrs: 14.00 GPA-Hrs: 10.00 QPts: 38.35 GPA: 3.83						
Spring 2023 - Urbana-Champaign						
Law						
Law						
LAW	638	White Collar Crime	3.00	S	0.00	
LAW	679	Criminal Proc: Adjudication	3.00	A	12.00	
LAW	694	Adv Civil Trial Advocacy	3.00	A+	12.00	
LAW	694	Trial Team	2.00	A+	8.00	
LAW	696	Elder Law Journal	1.00	S	0.00	
LAW	792	Judicial Opinion Writing	2.00	S	0.00	
Ehrs: 14.00 GPA-Hrs: 8.00 QPts: 32.00 GPA: 4.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	63.00	48.00	173.29	3.61
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	63.00	48.00	173.29	3.61

********** END OF TRANSCRIPT **********

Recipient: **CPOWERS5@ILLINOIS.EDU**

Student email: **cpowers5@illinois.edu**

Issued to: **REFNUM: 20005857499**

Meghan Hazen, Registrar

This electronic transcript, as delivered in PDF form, has a transcript explanation at the end of the document which details authentication information.

www.registrar.illinois.edu

UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN
OFFICE OF THE REGISTRAR, 901 W ILLINOIS, SUITE 140, URBANA, IL 61801-3446

PH (217) 333-9778 /
FAX (217) 333-3100

FULL TRANSCRIPT EXPLANATION IS AVAILABLE ON THE WEB AT: http://go.illinois.edu/transcript
Transcript information for students who attended the University of Illinois Urbana-Champaign prior to 1982 is available at: https://registrar.illinois.edu/wp-content/uploads/2018/06/pre_1982_key.pdf

ACCREDITATION:
Higher Learning Commission of the North Central Association of Colleges and Schools.

ACADEMIC CALENDAR:
The University of Illinois Urbana-Champaign operates on an academic calendar of two sixteen-week semesters and, beginning in 2005, one twelve-week summer term. Prior to 2005, the summer calendar included a four-week summer session (referred to as Intersession prior to 1995) and one eight-week summer session. Beginning December 2014, winter sessions are included between the fall and spring semesters.

PRIVACY NOTICE:
In accordance with the Family Educational Rights and Privacy Act (FERPA) of 1974, this document cannot be released to a third party without the written consent of the student.

OFFICIAL TRANSCRIPT:
A transcript is official when it bears the signature of the Registrar on officially printed paper or an electronic version that is sent directly from the institution to the recipient (see below). Transcripts that are provided directly to students are marked “Issued to Student.” Partial or incomplete transcripts are not issued except upon request and only issued by student level (Undergraduate, Graduate, Law, Medicine, or Veterinary Medicine). Those transcripts are labeled “Partial Transcript.”

06/07/2022

C. Eliza Powers

11 Colony West Dr., Champaign, IL 61820 | (617) 279-3791| cpowers5@illinois.edu

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The following is an order, memorandum and recommendation I wrote during my internship with the Honorable Robert Jones, Jr. during the summer of 2022 regarding ineffective assistance of counsel. It was wholly adopted by the court and is included with his permission. I have removed several sections of the memo in order to maintain a manageable writing sample. All names and dates have been changed or redacted.

I. BACKGROUND

On Date, Petitioner was charged in a multiple defendant indictment by the grand jury in the Eastern District of North Carolina with conspiracy to commit sex trafficking of a minor, in violation of 18 U.S.C. § 1591(a)(1) and 1594(c) (Count One), aiding and abetting sex trafficking of a minor by force, fraud, coercion, in violation of 18 U.S.C. § 1591(a)(1), (b), and (2) (Count Two), and the manufacturing of child pornography, in violation of 18 U.S.C. § 2251(a) and (e) (Count Five). [DE-1].

Following a four-day trial, a jury found Petitioner guilty of Counts One and Two and not guilty of Count Five. [DE-284]. The district court sentenced Petitioner to 360 months for Count One and 480 months for Count Two to run concurrently. [DE-366, -431].

Petitioner appealed his conviction and sentence on Date. [DE-373]. On Date, the Fourth Circuit affirmed the judgment, finding Petitioner's argument regarding the limited discovery of his minor victim's health records unpersuasive and concluding that there was no error in the exclusion of his expert witness. [DE-467, -468].

On Date, Petitioner filed the present § 2255 motion, alleging that his trial counsel was ineffective for failing to provide a complete defense. [DE-487]. Specifically, Petitioner claimed counsel failed to investigate Petitioner's background and the prosecution's chief witness and failed to challenge by interlocutory appeal two of the district court's evidentiary rulings. The Government responded with a motion to dismiss. [DE-497]. Petitioner then filed two amendments to his § 2255 motion on Date, and Date, in which Petitioner claimed counsel failed to inform him of plea offers and plea negotiations with the Government. [DE-501, -502]. The United States then supplemented its submissions on Date and Date, to address Petitioner's new claims. [DE-512, -515]. Petitioner ultimately waived his initial § 2255 claims regarding counsel's alleged failure to

conduct a thorough investigation and challenge certain evidentiary rulings. Accordingly, the sole claim before the court is counsels' alleged ineffective assistance for failure to inform Petitioner of available plea bargains.

III. STANDARD OF REVIEW

Defendants convicted of a federal offense may collaterally attack their conviction or sentence in four ways: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. As such, relief under § 2255 "is not limited to constitutional error in a conviction or sentence." *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999). However, where the relief sought is due to a nonconstitutional error, "the scope of review . . . is more limited than that of a constitutional error; a nonconstitutional error does not provide a basis for collateral attack unless it involves a fundamental defect which inherently results in a complete miscarriage of justice, or is inconsistent with the rudimentary demands of fair procedure." *Id.* Moreover, "[i]n a § 2255 proceeding, the burden of proof is on petitioner to establish his claim by a preponderance of the evidence." *Toribio-Ascencio v. United States*, Nos. 7:05-CR-00097-FL, 7:08-CV-211-FL, 2010 WL 4484447, at *1 (E.D.N.C. Oct. 25, 2010) (citing *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958)).

IV. ANALYSIS

A. Motion to Amend

Petitioner moved on Date, to supplement his § 2255 petition on three issues: (1) Smith's and Doe's failure to communicate the Government's plea offers to Petitioner, (2) the lack of access to the unredacted medical records for Petitioner's victim, and (3) the proceeds from sex trafficking

used as child support payments. Petitioner subsequently waived his claims as to the second and third issues, [DE-540]. As to the first issue, the motion to amend is unopposed, and under Fed. R. Civ. P. 15(a)(2), leave to amend should be freely given. Accordingly, the motion to amend is allowed as to issue one and denied as to issues two and three.

B. Ineffective Assistance of Counsel Claim

Petitioner seeks relief under § 2255 for ineffective assistance of counsel based on counsels' alleged failure to communicate available plea agreements to Petitioner. Pet'r's Mot. [DE-501] at 1. Established in *Strickland v. Washington*, 466 U.S. 668, 690-694 (1984), an ineffective assistance of counsel claim requires a two-part test: (1) the petitioner must show that his counsel's performance was deficient in that it fell below the standard of reasonably effective assistance, and (2) the petitioner must show that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different.

In *Missouri v. Frye*, the Supreme Court held that counsel has a duty to communicate formal offers from the prosecution to the defendant, and that an attorney's failure to do so establishes a deficient performance, thus rendering ineffective assistance of counsel. 566 U.S. 134, 145 (2012). In order to demonstrate prejudice under *Frye* where a plea offer has lapsed due to ineffective assistance of counsel, the petitioner must establish "a reasonable probability that [he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel," and "that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147; *see Lafler* v. *Cooper*, 566 U.S. 156, 173–75 (2012); *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985) (the *Strickland* prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the plea process.").

Petitioner contends, in both his § 2255 motion, and in his testimony at the evidentiary hearing, that Smith and Doe failed to inform him of existing plea offers, and that Doe forced him to go to trial. Pet'r's Mot. [DE-501] at 1. Petitioner's claim is based on his recollection of his interactions with Smith and Doe during their respective times as his counsel. Petitioner testified that he repeatedly instructed Smith and Doe, separately, to negotiate a plea deal for him, as it was in his interest to accept a plea deal as opposed to going to trial. Petitioner asserted that, but for counsels' failure to communicate the plea agreements, he would have agreed to the Government's plea offer. As set forth below, both Smith's and Doe's testimony contradict Petitioner's testimony, and the contradicting testimony creates disputed issues of fact requiring a credibility determination.

To assess credibility of witnesses, "trial courts consider 'variations in demeanor and tone of voice.'" *Rahman v. United States*, No. 7:08-CR-126-D, 2013 WL 5222160, at *5 (E.D.N.C. Aug. 27, 2013) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985)), *report and recommendation adopted*, 2013 WL 5230610 (E.D.N.C. Sept. 16, 2013). "In addition, '[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.'" *Id.* (citing *United States v. Marcavage*, 609 F.3d 264, 281 (3d Cir. 2010)). "Additional considerations can include the witness's motive to lie and the level of detail in the witness's statements." *Id.* (citing *United States v. Wilson*, 624 F.3d 640, 665 (4th Cir. 2010)).

The court focuses on Smith's and Doe's testimony in determining whether Petitioner was advised of existing plea offers made by the Government. Petitioner's testimony that he instructed counsel to negotiate a plea offer so that he may accept one and that neither Smith nor Doe discussed the available plea agreements with him is not credible to the extent it is undermined by Smith's

and Doe's testimony and not supported by the documentary evidence in the form of Smith's meeting notes and Doe's time records. Smith's testimony is found to be credible and persuasive based on her years of experience as an Assistant Federal Public Defender and her documentary evidence in the form of personal notes from her meetings with Petitioner, all of which corroborate her testimony. Doe's testimony is found to be credible based on his extensive career of criminal defense work, as well as the documentary evidence which validates his testimony.

Petitioner testified that he made several requests to Smith to begin plea negotiations. He further stated that Smith never informed him of the first plea offer made by the Government. Based on the credible evidence, the court finds that Smith did inform Petitioner of the initial plea offer. Smith testified that it is her practice to inform her clients of all plea agreements from the Government and the court credits Smith on this fact. Further, Smith testified that, based on her notes of meetings with Petitioner which explicitly stated that a plea offer was available, she did discuss the offer with Petitioner. In contrast, Petitioner presented nothing more than "bare allegations" to prove his claim. *Adams v. United States*, No. 5:12-CR-00351-F-8, 2017 WL 1187642, at *9 (E.D.N.C. Mar. 29, 2017) (crediting counsel's testimony over the petitioner's regarding whether a second plea offer existed where the documentary evidence supported counsel's testimony). Smith's testimony and documentary evidence dispels the notion that she withheld the Government's plea offer from Petitioner prior to her recusal.

Petitioner further contended that Doe did not inform him of the initial plea agreement and ongoing plea negotiations, nor did Doe ultimately inform him of the Government's second plea offer. Based on the credible evidence, the court finds that Doe did advise Petitioner of both the first and second plea agreement. Doe testified to conversations he had with Petitioner regarding the Government's offer and explicitly recalled Petitioner stating that he could not plead guilty to a

crime he did not commit. Doe clearly understood Petitioner's concerns with the initial plea offer, as he negotiated a more favorable plea agreement that met one of Petitioner's demands. Additionally, as Petitioner has the burden of proof here, "his testimony also failed to present a theory as to why [Doe] . . . would have failed to communicate a plea agreement he has worked to negotiate." *Jackson v. United States*, No. 5:07-CR-110-FL-1, 2014 WL 7149635, at *4 (E.D.N.C. Dec. 15, 2014). Moreover, Doe's billing records substantiate his testimony, providing clear documentation of the plea agreements discussed during Doe and Petitioner's meetings, as opposed to Petitioner, who presented "no evidence to support [his] self-serving allegations." *Powell v. United States*, No. 5:04-CR-00356-F-1, 2014 WL 7182940, at *19 (E.D.N.C. Dec. 16, 2014) (crediting counsel's testimony over petitioner's regarding whether counsel conveyed a formal plea offer where there was no evidence to support petitioner's self-serving allegations, and counsel's testimony was supported by documentary evidence and counsel's routine practices), *aff'd*, 850 F.3d 145 (4th Cir. 2017).

Based on the foregoing, the credible evidence establishes that both Smith and Doe communicated the existing plea offers to Petitioner and that he expressly refused to agree to them. Although Petitioner was aware of the potential sentencing outcomes, it was solely his choice to continue to trial. As such, Petitioner has not satisfied his burden to show by a preponderance of the evidence that Smith and Doe provided ineffective assistance of counsel. *See Frye*, 566 U.S. at 149–151.

Applicant Details

First Name	**Gabriel**
Middle Initial	**R**
Last Name	**Segovia**
Citizenship Status	**U. S. Citizen**
Email Address	**gabriel.segovia@stcl.edu**
Address	**Address** Street **2415 Swift Blvd** City **Houston** State/Territory **Texas** Zip **77030** Country **United States**
Contact Phone Number	**7132537850**

Applicant Education

BA/BS From	**Texas A&M University-College Station**
Date of BA/BS	**December 2017**
JD/LLB From	**South Texas College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=74405&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**STCL Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Harmon Cooley, Amanda
acooley@stcl.edu
Wise, Justice Ken
ken.wise@txcourts.gov
713-274-2800
Gardner, Jeff
jeff_gardner@corps.tamu.edu
979-458-9317

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Gabriel R. Segovia
713-253-7850 | gabriel.segovia@stcl.edu | Houston, TX 77030

The Honorable David Morales
1133 N. Shoreline Blvd
Corpus Christi, Texas 78401

Dear Judge Morales,

I am a rising third-year law student at South Texas College of Law Houston (STCL), with three years of professional experience in the construction industry, seeking a clerkship for the 2024-2026 term. I would like to clerk for you due to your experience as a litigator for the state of Texas and now as a judge. I was born and raised in Houston and have spent most of my life traveling around Texas visiting friends or family. While I currently have few ties to Corpus Christi itself, I spent time there as a child with my family and visited more recently during my previous career for projects. After clerking, my intent is to pursue a career in complex commercial litigation in Texas, most likely in Houston.

Prior to Law School, after spending a period of time in both sales and operations, my career culminated in becoming a Project Manager. In this role I oversaw projects simultaneously across the country. This included monitoring project finances, allocating resources, as well as coordinating fabrication and installation. Attention to detail was crucial in all phases of these projects, from reviewing specifications and engineering drawings to planning installations and logistics. This was accompanied by the need to be able to adapt and overcome obstacles by working with my team.

Last summer I had the privilege to intern with Justice Wise at the Fourteenth Court of Appeals in Houston, Texas. I honed my legal research and writing skills by working with the staff attorneys on various memorandums. Additionally, I reviewed appellate briefs prior to oral arguments and then had the opportunity to discuss the cases with the justices. Through this I gained valuable insight into analyzing the law and also the standard to strive towards as an attorney.

While in the Corps of Cadets at Texas A&M I was instilled with the value of community and serving that community. As a result, I am currently a member of the Breeders Greeters Houston Rodeo Committee, in which I help move livestock in and out of the livestock show as a volunteer. I am also a part of various student organizations at STCL, which has resulted in becoming both an Articles Editor on our law review editorial board and a STCL representative with the Texas Aggie Bar Association, for this upcoming year. I believe I could learn from your experience as a litigator and judge while also having the opportunity to serve my community.

This summer I am splitting my time as an intern. First, at Thompson Coe in civil litigation, followed by interning for Justice Lehrmann at the Texas Supreme Court. I believe this combined with my prior experience will enable me to contribute meaningfully to your chambers as a clerk.

Thank you for taking the time to read this letter and consider my application. I have included references with my resume, in my application, in addition to my letters of recommendation.

Respectfully,

Gabriel R. Segovia

Gabriel R. Segovia

713-253-7850 | gabriel.segovia@stcl.edu | Houston, TX 77030

EDUCATION

South Texas College of Law Houston, Houston Texas May 2024
Doctor of Jurisprudence Candidate
GPA: 3.661 **Rank:** Top 15%
Honors: Presidential Fellows Fall 2021; Dean's Honor List Fall 2021, Fall 2023
Cali Award (highest grade): *Property II*
Journal: South Texas Law Review, *Articles Editor 2023-2024; Assistant Managing Editor Spring 2023*
Activities: Dean's Advisory Board, *Member*; Aggie Law Student Association, *VP Socials & Community Service*; Federalist Society, *Member*; Student Bar Association *1L Representative 2021-2022*

Texas A&M University, College Station Texas December 2017
Bachelor of Science, Industrial Distribution
GPA: 3.186
Activities: Corps of Cadets, *Artillery Officer for Parson's Mounted Cavalry*; Texas A&M Men's Water Polo *Coach*; Professional Association of Industrial Distribution, *Member*; Sigma Delta Honor Society, *Member*

LEGAL WORK EXPERIENCE

14th Court of Appeals, Justice Ken Wise | *Intern*, Houston Texas Half Summer 2022

- Reviewed appellate briefs prior to oral arguments, focused on spotting issues and comparing analysis by the parties.
- Observed oral arguments at the 1st and 14th Courts of Appeals and docket in the District Courts
- Discussed cases with the justices concerning the approaches by the attorneys, legal issues, analysis of the cases and applicable law
- Wrote legal memorandums which were used in the drafting of an opinion

CONSTRUCTION INDUSTRY WORK EXPERIENCE

Flexible Lifeline Systems | Houston Texas May 2019 – June 2021
Project Manager (November 2020 – June 2021)

- Engineering site visits which entailed consulting clients about their concerns and needs, took measurements, and performed preliminary analysis for potential issues and solutions regarding the design, installation, and eventual use of the systems
- Planned and supervised installations with teams involving logistics and adapting systems where novel issues presented themselves
- Monitored Key Performance Indicators and project finances through all project phases, including billable hours

Project Coordinator (September 2019 – November 2020)

- Coordinated workflow between company departments and tracking stages of each project
- Processed and organized project files, meeting notes, engineering drawings and their annotations

Inside Sales Manager (May 2019 – September 2019)

- Responsible for product sales and support for territory managers providing explanations for clients to address specification concerns for their projects
- Filed product orders ensuring that they met specifications and needs of the customer

Ferguson HVAC | *Technical Inside Sales*, Charlotte N.C., and Houston Texas February 2018 – March 2019

- Provided technical sales support, which involved the spotting and resolving inconsistencies in orders and client systems when components did not meet specifications

COMMUNITY INVOLVEMENT & INTERESTS

- Texas A&M Bar Association (TABA), *Member* Fall 2022 – Present
- Breeders and Greeters Houston Rodeo Committee Volunteer, *Shift Captain* Fall 2018 – Present
- Slacker Pit, Houston Rodeo BBQ Cook Off Team, *Member* Fall 2019 – Present
- Reading: nonfiction particularly history
- Outdoors: hunting, fishing, horsemanship, skiing
- Violin since the age of four

Gabriel R. Segovia
713-253-7850 | gabriel.segovia@stcl.edu | Houston, TX 77030

References

Elaine Carlson:
Professor of Law
South Texas College of Law
713-646-1870
ecarlson@stcl.edu
NOTE: Texas Pretrial Procedure Professor

Megan Brown:
Staff Attorney for the 14th Court of Appeals
713-836-2575
megan.brown@txcourts.gov
NOTE: Staff Attorney for Justice Wise; supervised my work during the Summer of 2022.

Josh Blackman:
Professor at Law
South Texas College of Law
713-646-1829
jblackman@stcl.edu
Note: Comment Supervisor and Property I Professor

Eric Menn:
Sales Manager
Flexible Lifeline Systems
713-828-5261
eric.menn@flexiblelifeline.com
NOTE: Supervised and taught by Eric before going on to work with him on various projects

(/StudentSelfService/)

Mr Gabriel Roberto Segovia

Student Academic Transcript

Academic Transcript

Transcript Level

Law

Transcript Type

Web

Student Information | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Curriculum Information

Current Program : Juris Doctor

Program

Law Student

Institution Credit

Term : Fall 2021

Academic Standing

No Standing

Additional Standing

Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	201	Main	LW	Criminal Law	B	3.000	9.000	
LAW	202	Main	LW	Contracts I	A	3.000	12.000	
LAW	203	Main	LW	Torts I	A	3.000	12.000	
LAW	204	Main	LW	Legal Research & Writing I	A-	3.000	11.001	
LAW	205	Main	LW	Civil Procedure I	A-	3.000	11.001	
LAW	563	Main	LW	Introduction to Law Study I	P	0.000	0.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	55.002	3.667
Cumulative	15.000	15.000	15.000	15.000	55.002	3.667

Term : Spring 2022

Academic Standing

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	206	Main	LW	Torts II	B+	3.000	9.999	
LAW	207	Main	LW	Property I	A-	3.000	11.001	
LAW	208	Main	LW	Contracts II	B	3.000	9.000	
LAW	210	Main	LW	Legal Research & Writing II	B+	2.000	6.666	
LAW	565	Main	LW	Civil Procedure II	A-	3.000	11.001	
LAW	583	Main	LW	Introduction to Law Study II	HP	1.000	0.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	14.000	47.667	3.405
Cumulative	30.000	30.000	30.000	29.000	102.669	3.540

Term : Fall 2022

Academic Standing	Additional Standing
Good Standing	Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	209	Main	LW	Constitutional Law	A+	4.000	17.332	
LAW	211	Main	LW	Federal Income Taxation	A-	3.000	11.001	
LAW	212	Main	LW	Property II	A+	3.000	12.999	
LAW	213	Main	LW	Evidence	B+	3.000	9.999	
LAW	214	Main	LW	Professional Responsibility	B+	3.000	9.999	
LAW	419	Main	LW	Law Review A	HP	0.000	0.000	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	61.330	3.833
Cumulative	46.000	46.000	46.000	45.000	163.999	3.644

Term : Spring 2023

Academic Standing	Last Academic Standing	Additional Standing
Good Standing	Good Standing	Dean's Honor List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	222	Main	LW	Insurance Law	A+	2.000	8.666	
LAW	224	Main	LW	First Amendment Law	A-	2.000	7.334	
LAW	228	Main	LW	Wills, Trusts & Estates	A-	3.000	11.001	
LAW	232	Main	LW	Texas Pretrial Procedure	B	3.000	9.000	
LAW	420	Main	LW	Law Review B	HP	1.000	0.000	
LAW	542	Main	LW	Advanced Legal Research Skills	A+	2.000	8.666	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	12.000	44.667	3.722
Cumulative	59.000	59.000	59.000	57.000	208.666	3.661

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	59.000	59.000	59.000	57.000	208.666	3.661
Total Transfer	0.000	0.000	0.000	0.000	0.000	0.000
Overall	59.000	59.000	59.000	57.000	208.666	3.661

Course(s) in Progress

Term : Summer 2023

Subject	Course	Campus	Level	Title	Credit Hours
LAW	446	Main	LW	Judicial Externship	3.000
LAW	594	Main	LW	Professional Competency Sem	0.000

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Writing Sample

This writing sample is a legal memorandum from my summer internship with Justice Ken Wise on the 14th Court of Appeals. I am submitting this with permission, and with the necessary redactions and changes to preserve confidentiality.

Background Facts:

The appellant in this case alleged that the trial judge should have been recused or disqualified from the case. This was because the employee in question, had notarized the deed in dispute years prior to working for the court. The appellant asserted this issue on appeal giving rise to whether the issue had been properly preserved and if there was merit to appellant's arguments.

Question Presented

Appellant's first issue is whether the trial judge should have recused himself or been disqualified due to a non-attorney employee of the trial court ("employee") previously notarizing the deed that is in dispute in the case. This issue presented concerns: (1) whether preservation is required to appeal the recusal or disqualification of a trial court judge; (2) whether the issue was properly preserved; and (3) whether there is any merit to the argument for the judge's recusal or disqualification.

Brief Answer

The court should overrule appellant's first issue because: (1) recusal must be preserved for appeal, and appellant failed to preserve error if any; and (2) even though disqualification may be raised for the first time on appeal, there is no merit to appellant's arguments regarding disqualification.

Discussion

The procedure to disqualify or recuse a judge is identical. *See* Tex. R. Civ. P. 18a. However, grounds for disqualification and recusal differ. *See* Tex. R. Civ. P. 18b; *see also* Kilgarlin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986). An erroneous denial of a recusal motion is not considered a fundamental error and can be waived if not raised by proper motion. *In re Union Pac. Resources Co.*, 969 S.W.2d 427, 428 (Tex.1998) (orig. proceeding). Disqualification may be raised for the first time upon appeal. *See Buckholts Indep. Sch. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982).

I. Recusal is waived unless there is a motion, and it is preserved for appeal.

To preserve an error, the record must demonstrate that a complaint was made to the trial court by motion, objection, or timely request. Tex. R. App. P. 33.1 (a). A party failing to file a proper motion in accordance with Rule 18a waives his right to complain of the failure of a judge

to recuse himself. *Johnson v. Sepulveda*, 178 S.W.3d 117, 118 (Tex. App. — Houston [14th Dist.] 2005, no pet.); *see also McElwee v. McElwee*, 911 S.W.2d 182, 185 (Tex. App. — Houston [1st Dist.] 1995, writ denied). Recusal is waived unless it is preserved for appeal. *In re Wilhite*, 298 S.W. 3d 754, 757 (Tex. App. — Houston [1st Dist.] 2009, no pet.) (citing *Glaser*, S.W.2d 146, at 148. Where a record does not contain a proper, timely motion for recusal, the appellant has failed to preserve any error for review. *See Galvan v. Downey*, 933 S.W.2d 316, 321 (Tex. App.— Houston [14th Dist.] 1996, writ denied) (ruling that the error was not preserved when there was no record of a motion to recuse); *see Barkley v. Texas Windstorm Ins. Ass'n*, No. 14-11-00941-CV, 2013 WL 5434171, at *3 (Tex. App. — Houston [14th Dist.] Sept. 26, 2013, no pet.) (per curiam) (mem. op.) (where no motion for recusal was in the record, the appellant failed to preserve error for review); *see also Soderman v. State*, 915 S.W.2d 605, 608–09 (Tex. App.—Houston [14th Dist.] 1996, pet ref'd) (even if recusal motion is meritorious, failure to file a timely motion resulted in waiver).

Here there is no recusal motion in the record on appeal. Appellant neither asserts nor cites to motion or request for recusal made in the trial court. Because appellant failed to file a motion for recusal in the trial court, he failed to preserve the issue. *See* Tex. R. App. P. 33.1(a); *Johnson*, 178 S.W. 3d at 118; *McElwee*, 911 S.W.2d at 185. This Court should overrule appellant's recusal issue. *Soderman*, 915 S.W.2d at 608–09.

II. Disqualification may be raised for the first time on appeal but there is no merit to the argument for the judge's disqualification.

Disqualification may be raised any time, including for the first time on appeal. *McElwee*, 911 S.W.2d at 186; *see also Buckholts Indep. Sch.*, 632 S.W.2d 146 at 148; *see also Sun Expl. & Prod. Co. v. Jackson*, 729 S.W.2d 310, 312 (Tex. App. — Houston [1st Dist.] 1987*), rev'd on other grounds*, 783 S.W.2d 202 (Tex. 1989). "Orders or judgments rendered by a judge who is

constitutionally disqualified are void and without effect." *In re Union Pac. Resources. Co.*, 969 S.W.2d at 428. The standard for disqualification raised for the first time on appeal is de novo. *McElwee*, 911 S.W.2d at 185.

A. The First Court of Appeals ruled that the appearance of partiality was not grounds for disqualification of a judge.

The appearance of partiality is not a basis for disqualification of a judge in Texas. *In re Wilhite*, 298 S.W.3d at 758; *see also* Tex. R. Civ. P. 18b(a). Instead, and unlike its federal counterpart, the appearance of partiality is a basis for recusal. *See In re Wilhite*, 298 S.W. 3d at 758 ("This part of the federal rule for disqualification matches the Texas rule for recusal that states that a 'judge shall recuse himself in any proceeding in which: (a) his impartiality might reasonably be questioned.'" (citing Tex. R. Civ. P. 18b(2)).

Appellant argues that the appearance of partiality to a reasonable person should result in the disqualification of the judge. ANT. AMEND. BRF. However, this would result in an application of the federal standard for disqualification where disqualification may be based on the reasonable questioning of impartiality. *See* 28 U.S.C 455 (a); *see also In re Wilhite* 298 S.W.3d at 758. Instead, in Texas, appearance of partiality is a ground for recusal. Had appellant preserved the issue of recusal then this argument could have potentially been asserted more appropriately under Rule 18b(b)(1). However, as there are no grounds for disqualification of a judge based on the appearance of partiality, the Court should rule against the disqualification of the trial court judge.

B. Appellant argues for vicarious disqualification due to the judge's professional relationship with the Employee.

There are three independent grounds for disqualification: (1) that the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter; (2) the judge has a financial

interest in the case; or (3) either party is related to the judge within the third degree by affinity or consanguinity. TEX. CONST. art. V, § 11; Tex. R. Civ. P. 18b(a). The Texas Constitution and Rule 18b specify the same three grounds for disqualification; they are mandatory, inclusive, and exclusive bases for disqualification. *Tesco American, Inc. v. Strong Ind. Inc.*, 221 S.W.3d 550, 553 (Tex. 2006). Rule 18b was intended to expound rather than expand the Constitution. *Id.* at 553. Appellant does not cite specifically to any of the three grounds but advocates for vicarious disqualification[1] due to the professional relationship with the employee under the first ground. ANT. AMEND. BRF. 4.

A judge is, "[vicariously] disqualified when two prongs are met: first, the judge or the judge's law firm was the attorney for a party in the case, and second, the matter before the judge is the same matter that was before the judge or judge's law firm." *In re Wilhite*, 298 S.W.3d at 758 (citing *In re O'Connor*, 92 S.W.3d at 448). In *Wilhite*, the court held that the judge was not disqualified from the case even though his prior law firm represented the defendant in similar suits because: (1) the plaintiffs being complete strangers, not joined in their lawsuits in any way; (2) the plaintiffs had unrelated injuries; (3) the record did not demonstrate that the causes of action arose from the same incident; and (4) the dispute was not a continuing series of lawsuits concerning a subject from the time when the judge was working at the firm. *Id.* at 756–760. The court also stated that a decision for disqualification under these facts would "place every future judgement in peril because none of those judgements will be final until a party, post-judgement, conducts a full investigation of similarities between the present lawsuit" and others that were handled by the judge's prior law firm. *Id.* at 761.

[1] *Tesco American, Inc. v. Strong Industries, Inc.*, 221 S.W.3d 550, 553 (Tex. 2006) (holding that Rule 18b(1)(a) recognizes vicarious liability for trial judges).

Appellant alleges that the employee, is a potential witness in the case as the notary on deeds relied on by the Appellee. C.R. 57; ANT. AMEND. BRF. 4. The court relied on these deeds that were allegedly notarized by the employee in granting the motion for a no evidence summary judgment. ANT. AMEND. BRF. 4. Appellant argues that there is an appearance of impropriety for the judge to sit in judgement of evidence that included the judge's own employee as a witness. ANT. AMEND. BRF. 1.

Assuming the facts alleged by appellant are true,[2] appellant does not argue any grounds for disqualification enumerated in Rule 18b(a). Appellant points to the professional relationship between the judge and the employee, who was the alleged notary that witnessed the signing of the deed at issue. ANT. AMEND. BRF. 4. The employee was not an associate attorney of the judge working on the same matter at his prior firm. Unlike *In re Wilhite*, where the judge had ties through his prior association with a law firm to similar subject matter, appellant is arguing the appearance of partiality due to the employee's prior work as a notary public. This does not follow the plain language of the Rule 18b(a)(1) and could open judgments to scrutiny based on any previous association with parties or subject matters by judges either directly or vicariously through their staff. *See In re Wilhite*, 298 S.W.3d at 761. This court should overrule appellant's disqualification issue.

Conclusion

Appellant failed to raise the issue of recusal in the trial court. As a result, appellant's arguments on recusal are not preserved on appeal. However, disqualification may be raised for the first time on appeal. While appellant's argument based on the appearance of impropriety may have been a

[2] When disqualification is first raised on appeal, the fact of disqualification "must be determined from the record," and if it does not appear in the record, then "unverified allegations will not suffice on appeal." *Sun Expl. & Prod. Co. v. Jackson*, 729 S.W.2d 310, 314 (Tex. App. — Houston [1st Dist.] 1987), rev'd on other grounds, 783 S.W.2d 202 (Tex. 1989) (holding that the movant failed to demonstrate in the record that the trial judge was disqualified).

basis for recusal, it was not preserved. Appearance of partiality or a reasonable question of partiality is not a basis for disqualification. Appellant failed to demonstrate any of the three possible grounds for disqualification. As a result, this Court should overrule appellant's first issue.